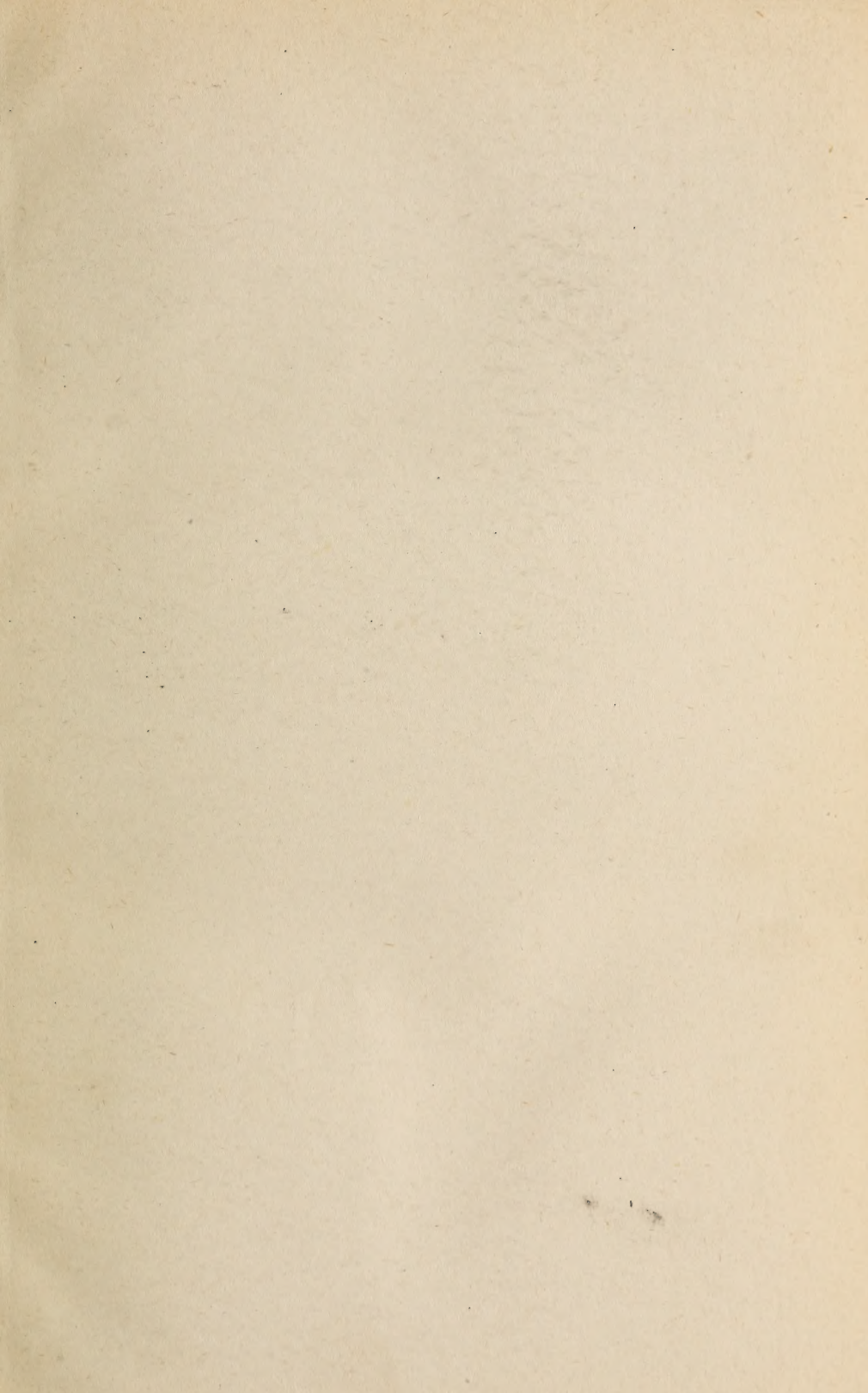


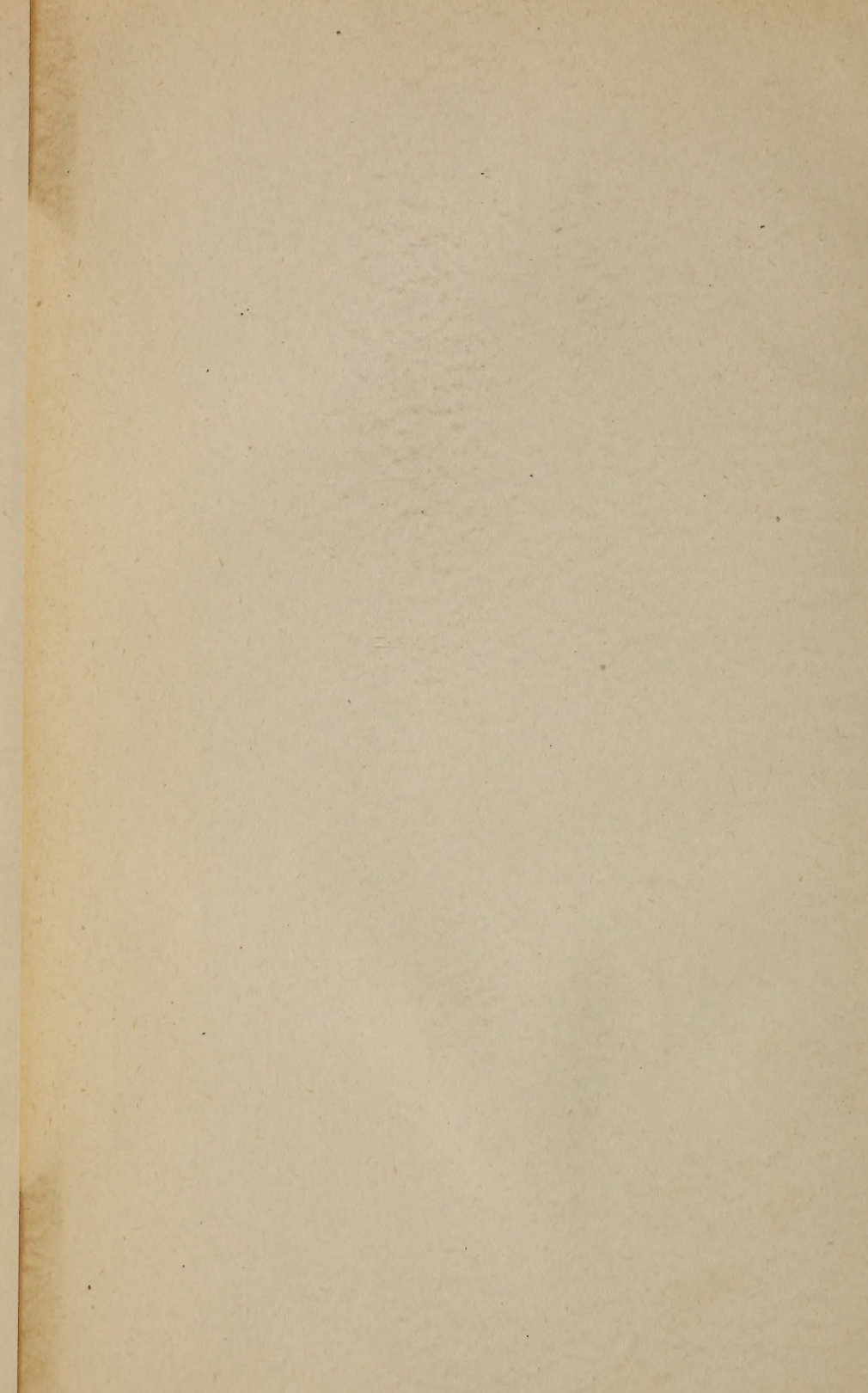
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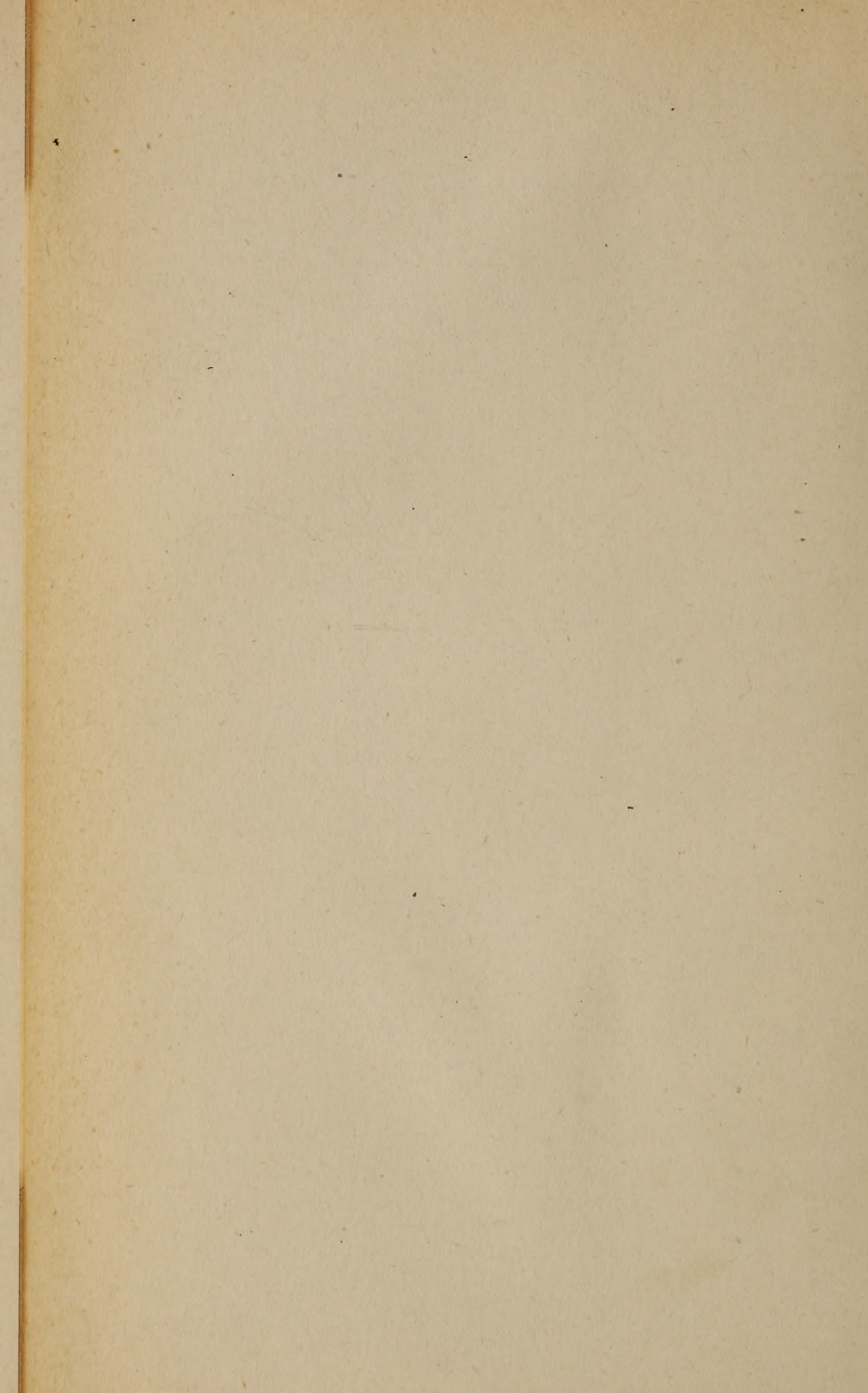
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THE
ONTARIO LAW REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1919.

REPORTED UNDER THE AUTHORITY OF THE
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JUDGES
OF THE
SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.

- “ “ JOHN JAMES MACLAREN, J.A.
- “ “ JAMES MAGEE, J.A.
- “ “ FRANK EGERTON HODGINS, J.A.
- “ “ WILLIAM NASSAU FERGUSON, J.A.

Second Divisional Court.

THE HON. RICHARD MARTIN MEREDITH, C.J.C.P.

- “ “ BYRON MOFFATT BRITTON, J.
- “ “ WILLIAM RENWICK RIDDELL, J.
- “ “ FRANCIS ROBERT LATCHFORD, J.
- “ “ WILLIAM EDWARD MIDDLETON, J.

HIGH COURT DIVISION.

THE HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., President.

- “ “ SIR WILLIAM MULOCK, K.C.M.G., C.J. Ex.
- “ “ ROGER CONGER CLUTE, J.
- “ “ ROBERT FRANKLIN SUTHERLAND, J.
- “ “ WILLIAM EDWARD MIDDLETON, J.
- “ “ HUGH THOMAS KELLY, J.
- “ “ HAUGHTON LENNOX, J.
- “ “ CORNELIUS ARTHUR MASTEN, J.
- “ “ HUGH EDWARD ROSE, J.
- “ “ WILLIAM ALEXANDER LOGIE, J.

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16th October, 1919.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[APPELLATE DIVISION.]

RE ALBIN AND CANADIAN PACIFIC R.W. CO.

1919

Jan. 9.

Railway—Injury to Land (no Part of which is Taken) by Construction of Subway—Lowering Grade of Street—Interference with Access to Shop—Right to Compensation—Award—Valuation of Property before Work Done—Appeal—Deduction of Proceeds of Sale after Work Done—Gross or Net Proceeds—Allowance for Loss of Business—Railway Act, R.S.C. 1906, ch. 37, sec. 155—Basis on which Allowance to be Fixed.

The contestants, a railway company, in the construction, for the purposes of their railway, of a subway in a city street, lowered the level of the street in front of the claimant's land, upon which she carried on the business of a confectioner, thus interfering with access to her property from the street. Upon an arbitration to determine the compensation to be paid to the claimant for damage sustained by reason of the construction of the subway, the arbitrator found that the value of the claimant's property, before the work was done by the company, was \$9,274; he deducted therefrom \$2,908, the net proceeds of the sale of the property after the work had been done, and allowed for depreciation \$6,366; he allowed, in addition, \$4,500 for loss of business:—

Held, on appeal by the railway company from the award, that the claimant was entitled to compensation; and that the finding of the arbitrator as to the value of the property before the work was done, could not be interfered with.

Per RIDDELL and KELLY, JJ., that the arbitrator should have deducted from the gross value of the property before the work was done, as found by him, the gross proceeds of the sale, instead of the net proceeds.

And *held* (RIDDELL, J., dissenting), that the arbitrator had power, under sec. 155 of the Railway Act, R.S.C. 1906, ch. 37, to allow the claimant, as part of her compensation, a sum of money for loss of business, although no land of the claimant was taken.

Review of the authorities.

The arbitrator, in fixing a sum to be allowed for loss of business, adopted as the basis the loss of profits for three years:—

Held, that this was not the proper basis; and the matter was sent back to the arbitrator to ascertain the entire compensation to which the claimant was entitled, and in doing so to consider the evidence of the loss of business, and make such allowance therefor, as forming part of the compensation to be allowed, as he might, in the circumstances, think just.

AN appeal by the railway company, contestants, from an award of an arbitrator determining the compensation to be paid to the claimant, Alberta Albin, for injury sustained by the construction by the contestants of a subway in Yonge street in the city of Toronto.

App. Div.
1919
RE
ALBIN
AND
CANADIAN
PACIFIC
R.W. Co.

The claimant's premises, in which she carried on the business of a confectioner, were situated on the west side of Yonge street, a short distance north of the railway tracks.

The arbitrator allowed \$10,866, of which \$4,500 was for loss of business. The balance represented the depreciation in the value of the property.

November 15, 1918. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

C. M. Colquhoun, for the appellant company, argued, first, that the value placed by the arbitrator upon the property before the work was done by the company, namely, \$9,274, was too high. But, if this sum were allowed to stand, the gross proceeds of sale, \$3,100, not the net proceeds, \$2,908, should be deducted therefrom in order to ascertain the compensation for damage to the land. He also contended that it was shewn that other causes besides the construction of the subway, such as the removal of the Metropolitan Railway station, tended to depreciate the value of the property. His chief contention was, that nothing should have been allowed for loss of business. He argued that where no land was taken there could be no allowance for loss of business: compensation must be based on injury to the land itself: *Cripps' Law of Compensation*, 5th ed., p. 10; *Ricket v. Metropolitan R.W. Co.* (1867), L.R. 2 H.L. 175; *Powell v. Toronto Hamilton and Buffalo R.W. Co.* (1898), 25 A.R. 209; *Leblanc v. The King* (1917), 16 Can. Ex. C.R. 219, 38 D.L.R. 632. The right of access was not a right or privilege in, over, or affecting lands. The right of access here was only an easement, which was not "land:" *Macey v. Metropolitan Board of Works* (1864), 33 L.J. Ch. 377.

William Laidlaw, K.C., for the claimant, respondent, argued that the \$4,500 item for loss of business was justified. The authorities cited against it were nearly all under the English Lands Clauses and Railways Clauses Acts, the wording of which was sufficiently different from the Canadian Railway Act to render these decisions inapplicable. The English cases referred to at any rate were distinguishable on their facts. Even under the English Acts, the claim for loss of trade in a case like the present would be justified, as could be seen by a consideration of English cases of similar nature where the land itself is injuriously affected by the

cutting off of access: *Caledonian R.W. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259; *Metropolitan Board of Works v. Mc Carthy* (1874), L.R. 7 H.L. 243. The only Canadian case referred to by the other side was *Leblanc v. The King*. But it was not clear in that case that loss of business was considered in relation to depreciation in the value of the property. Under the Canadian Railway Act, counsel submitted, the claimant was certainly entitled to the damages awarded for interference with access and consequential loss of trade: *Re McCauley and City of Toronto* (1889), 18 O.R. 416; *City of Toronto v. J. F. Brown Co.* (1917), 55 Can. S.C.R. 153, 37 D.L.R. 532; *Re Birely and Toronto Hamilton and Buffalo R.W. Co.* (1897), 28 O.R. 468; *S.C.* (1898), 25 A.R. 88.

Colquhoun, in reply.

January 9, 1919. CLUTE, J.:—Appeal from the award of His Honour Judge Coatsworth, in a matter referred to him by an agreement of reference to determine the compensation to be paid to the claimant for damages sustained by reason of the construction by the contestants of a subway in Yonge street.

The claimant's premises were No. 1204, situate on the west side of Yonge street, a short distance north of the Canadian Pacific Railway tracks.

His Honour allowed \$10,866, of which \$4,500 is "for loss of business." The balance, \$6,366, represents the depreciation in the value of the property. There was no serious dispute as to the correctness of the amount thus allowed for depreciation, nor could there be, except possibly in respect of the costs of the sale of which I shall speak presently.

But it is contended that, under the statutes and authorities governing the case, the claimant is not entitled to be allowed anything for her loss of trade.

It is quite clear that, although no land of the claimant was taken, she was entitled to damages by reason of the railway company having cut away the street in front of her premises to the depth of over 5 feet, thus destroying her approach to Yonge street.

It is not disputed that the claimant was entitled to compensation, although none of her land was taken.

It has been held under the Imperial Acts (the Lands Clauses Consolidation Act, 1845, 8 Vict. ch. 18, sec. 68, and the Railways

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Clauses Consolidation Act, 1845, 8 Vict. ch. 20, secs. 6 and 16) that damage recoverable under the words "injuriously affected" must result from an act made lawful by the statutory powers or be such as would have been actionable but for the statutory powers.

It is therefore necessary to examine in what respect our statute differs, if at all, from the Imperial Acts.

It will be seen by reference to these sections, that sec. 68 of ch. 18 and secs. 6 and 16 of ch. 20 refer to lands taken or "injuriously affected."

Section 68 contains these expressions: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works . . . " he is to follow the course therein directed, that is, he may have an arbitration or a jury.

In the Railways Clauses Act, 8 Vict. ch. 20, sec. 6 declares: ". . . the company shall make to . . . all other parties . . . injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, *as regards such lands*, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company . . . The amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act."

Section 16, after giving powers to execute the works, goes on to say: "Provided always, that in the exercise of the powers by this or the special Act granted the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers."

The Canadian Railway Act, R.S.C. 1906, ch. 37, sec. 155, follows the wording of the latter portion of sec. 16, but uses the word "compensation" instead of "satisfaction," and is as follows: "The company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act

provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers."

Section 6 of ch. 20 and sec. 68 of ch. 18 of the Imperial Acts were not introduced in our statute, which does not limit the compensation to lands "injuriously affected" or as "regards such lands," as do the Imperial Acts. The right to compensation under our Act is declared by sec. 155, and is, in my opinion, distinctly different in its meaning and intendment from the sections of the Imperial Act above referred to.

It was held by Armour, C.J., in the case of *Re Birely and Toronto Hamilton and Buffalo R.W. Co.*, 28 O.R. 468, under the Canadian Railway Act, 51 Vict. ch. 29, sec. 92 (now 155), that the claimant was entitled to an award of damages arising in respect of the operation of the railway, notwithstanding that no part of his lands had been taken for the railway, and he distinguished *Hammersmith etc. R.W. Co. v. Brand* (1869), L.R. 4 H.L. 171, wherein it was held, under the Imperial Acts, that a person whose land had not been taken for the purposes of the railway could not recover statutory compensation from the railway company in respect of damage or annoyance from vibration occasioned by the passing of trains after the railway was brought into use, even though the value of the property has been actually depreciated thereby. Armour, C.J., referring to the *Hammersmith* case, says: "That case is no authority upon the construction of the (Canadian) Railway Act, 51 Vict. ch. 29, for it was decided upon the construction of the Imperial Act 8 Vict. ch. 20, which differs essentially from the Canadian Railway Act; and it is safe to say that, had the Imperial Act 8 Vict. ch. 20 been identical with the Railway Act, the decision would have been the other way." An appeal from this judgment was quashed: see 25 A.R. 88.

The *Birely* case was cited in *Powell v. Toronto Hamilton and Buffalo R.W. Co.*, 25 A.R. 209, and it was there pointed out by Osler, J.A. (pp. 213, 214), that the case differed altogether from such cases as *Corporation of Parkdale v. West* (1887), 12 App. Cas. 602; *Bowen v. Canada Southern R.W. Co.* (1887), 14 A.R. 1; *Beckett v. Midland R.W. Co.* (1867), L.R. 3 C.P. 82; *Caledonian R.W. Co. v. Walker's Trustees*, 7 App. Cas. 259; *North Shore R.W. Co. v. Pion* (1889), 14 App. Cas. 612, "where, by the actual construction of the railway, the access to private property was inter-

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fered with and practically destroyed. In cases of that class there is a permanent injury to the estate of the land-owner, which, upon the principles explained and illustrated in these decisions, entitles him to compensation, although none of his land is actually taken."

It will be observed that the case at bar differs essentially from the *Powell* case in this, that the damage in the *Powell* case was from anticipation of injury by reason of the operation of the railway after construction, and it is expressly distinguished from the present case, where, by the actual construction of the railway, access to private property was interfered with and practically destroyed.

In *Ricket v. Metropolitan R.W. Co.*, L.R. 2 H.L. 175, the claim was for (1) damage to the structure of the house, and (2) with respect to the claim for loss of profits. The jury found that there was no damage to the structure of the house, but that the plaintiff sustained damage in respect of the interruption to his business, and gave a verdict for £100. The case was afterwards removed into the Queen's Bench, the facts were turned into a special case, and the question for the opinion of the Court was, "whether the loss of customers by the plaintiff in his trade, under the above circumstances, was such damage as entitled him to recover from the company?" The Court, consisting of four Judges, unanimously gave judgment in favour of Ricket. The case was taken on error to the Exchequer Chamber, where it was heard by six Judges, four of whom were for reversing, and two for affirming, the judgment of the Court below. It was therefore reversed, and error was then brought to the House of Lords. The case was heard by the Lord Chancellor (Lord Chelmsford), Lord Cranworth, and Lord Westbury, and the judgment of the Exchequer Chamber was affirmed by the judgment of two, the third (Lord Westbury) dissenting.

Ricket was the occupier of a public house, situate in a place known as Crawford Passage, opposite Bowling Green Lane. It did not appear that the defendants blocked the immediate approach to Ricket's public house; they blocked the carriage-way of Bowling Green Lane, but gave a passage to foot-passengers across Coppice Row to the passage which led to the public house. This obstruction was continued for 12 months, and then the streets and passages were restored to their original condition.

The House of Lords held, Lord Westbury dissenting, that Ricket was not entitled under the 68th section of the Lands Clauses Act, nor the 6th or the 16th section of the Railways Clauses Act, to receive compensation for injury to his trade consequent upon these obstructions. Lord Westbury said (p. 202): "There is nothing in the statutes," that is, these two statutes, "to warrant the position that there shall be no compensation where at common law there would have been no right of action;" and also (head-note): "The trade carried on in particular premises is a thing appertaining to the premises, and, as such, is included in the 'interest' of the occupier; and that interest is part of the value of the property, and if injuriously affected, is to be compensated." Lord Westbury was also (head-note) of the opinion that the meaning of "parties interested," in the 16th section of the Railways Clauses Act, is, parties sustaining a special and individual loss by reason of the works which the section empowers the company to construct, and Ricket was entitled to compensation under this section. Thus four Judges of the Queen's Bench, two of the Exchequer Chamber, and one of the House of Lords, were of the view that Ricket was entitled to recover, and four Judges of the Exchequer Chamber and two of the House of Lords that he was not.

The facts in the *Ricket* case are so widely different from those in the present case that, even if it should be held that our statute is in effect the same as the English Acts, it is not an authority against the claimant binding in this case.

The *Ricket* case has been considered and followed in subsequent cases; the effect of it is considered in *Metropolitan Board of Works v. McCarthy*, L.R. 7 H.L. 243; and to explain its effect, it is necessary to bear in mind the special points upon which the decision turned.

Lord Chelmsford, in the *Ricket* case, L.R. 2 H.L. at p. 188, states that "the damage which is the foundation of the claim to compensation . . . is too remote to be the subject of an action." This finding would have been sufficient in law to dispose of the case.

This question is dealt with in Cripps' Law of Compensation, 5th ed., p. 145: "If on the facts a jury or arbitrator had found that the damage complained of had affected the value of the premises apart from any question of injury to trade, a claim to compensation could have been maintained."

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In the case of *Metropolitan Board of Works v. McCarthy*, the facts were as follows:—

M. was the lessee or occupier of a house in close proximity to a draw-dock which opened into the Thames. He had no right, in any way, to the use of the dock, except as one of the public; but, his premises being in close proximity to it, his use of it for the purposes of his business was very constant. The dock was entirely destroyed by the works of the Thames Embankment. M. sought compensation. The case submitted to the Court stated, "that by reason of the destruction of the dock, and the destruction thereby of the access to and from the Thames, the plaintiff's premises became and were, as premises either to sell or occupy in their then condition, and with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value." It was held that the plaintiff was, on these facts, entitled to compensation. This case was decided upon the meaning of the words "injuriously affected." The Lord Chancellor (Lord Cairns) said (p. 252): "The proper test is to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the works had not been authorised by Act of Parliament. I do not pause to inquire whether or not, if the question was not to be decided for the first time, it is not a test somewhat narrow. I accept that test as being the test which has been laid down, and which has formed the foundation for the decision of so many cases before the present." He then (p. 253) referred to the argument of Mr. Thesiger, who stated "that the test . . . was this, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value." The Lord Chancellor (pp. 253, 254) referred to the *Ricket* case, "which at first sight was supposed to militate against this proposition . . . but in truth that case has no application whatever to the present." Lord Chelmsford referred to the many irreconcilable decisions

under the Lands Clauses and Railways Clauses Acts, and said (p. 256): "It may be taken to have been finally decided that in order to found a claim to compensation under the Acts there must be an injury and damage to the house or land itself in which the person claiming compensation has an interest. A mere personal obstruction or inconvenience, or a damage occasioned to a man's trade or the goodwill of his business, although of such a nature that but for the Act of Parliament it might have been the subject of an action for damages, will not entitle the injured party to compensation under it."

Beckett v. Midland R.W. Co., L.R. 3 C.P. 82, was approved. In that case the plaintiff's house fronted on a public highway. The defendant railway company, under its powers, erected an embankment, thereby narrowing the road from 50 to 33 feet, and thus, according to the evidence, materially diminishing the value of the house for selling or leasing. It was held that this was such a permanent injury to the estate of the plaintiff in the premises as to entitle him to compensation under the Lands Clauses Consolidation Act and Railways Clauses Consolidation Act, 1845. *Ricket v. Metropolitan R. W. Co.* (*supra*) was observed upon and distinguished.

When the facts in *Metropolitan Board of Works v. McCarthy* are considered, it strongly supports the claimant's rights in the present case.

In the *McCarthy* case the plaintiff claimed compensation for damages to his property caused by the works of the Thames Embankment. He carried on the business of a carman and contractor for supplying builders with lime, bricks, and other building material, and as a dealer in sand and ballast, near a dock leading to the Thames, which dock was largely used by the plaintiff in the way of his business. This dock was a free and open public dock; the plaintiff had no right or easement in the dock other than as one of the public, nor was there, appurtenant or otherwise belonging to his premises, any other right or privilege in or to the dock. By reason of the proximity of the dock to the plaintiff's premises and the access thereby given to and from the Thames, the premises were rendered more valuable to sell or occupy with reference to the uses to which any owner might put them. In the execution of the works, a solid embankment was carried along the foreshore

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of the Thames, thus permanently stopping up and destroying the dock. By reason thereof the access through the dock to and from the Thames was destroyed, and the plaintiff's premises became and were as premises, either to sell or occupy, with reference to the uses to which any owner or occupier might put them in the then state and condition, permanently damaged and diminished in value. It was held that the plaintiff, on the facts, was entitled to compensation, and the damages were assessed at £1,900. Lord Chelmsford, at p. 259, said: "I cannot help observing that the Judges in the Court below appear to me to have needlessly embarrassed themselves with the consideration whether this case is distinguishable from *Ricket's Case*. The distinction is marked and obvious. In *Ricket's Case* there was no finding which related to the premises, but merely of a personal damage; here the special case expressly states an injury and damage to the premises."

Lord O'Hagan, while fully concurring in the judgment, intimated his opinion that the observations of Lord Westbury in the *Ricket* case had laid down the correct rule for construing sec. 68 of the Lands Clauses Act. The Legislature never intended "that the community should profit at the expense of a few of its members" (p. 265).

In *Caledonian R.W. Co. v. Walker's Trustees*, 7 App. Cas. 259, the Scottish Railways Clauses Act of 1845 (similar to the English Act) was considered. The trustees were possessed of a spinning mill 90 yards from an important main thoroughfare in Glasgow, having parallel accesses on the level from two sides of the mill to the thoroughfare. A railway company under their special Act cut off entirely one access, substituting therefor a deviated road over a bridge with steep gradients. And the other access they diverted and made less convenient. When the bill was before Parliament, the trustees were induced to withdraw their opposition in consideration of an agreement, by which the company undertook that, in the event of the land of the trustees and of others being injuriously affected by the construction of any of the works proposed by the bill, their claim to compensation should not be barred by reason of the company not taking part of their land. Held, that though the agreement gave no right to compensation, the trustees were entitled to it under the Railways and Lands Clauses Consolidation (Scotland) Acts, 1845. *Per* Lord Selborne,

L.C.: "The obstruction of access to a private property by a public road need not be *ex adverso*, but it must be proximate and not remote or indefinite to entitle the owner of that property to compensation for the loss of it." The *McCarthy* case was held undistinguishable; the *Chamberlain** and *Beckett* cases approved; *Ricket v. Metropolitan R.W. Co.* examined.

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Lord Selborne (p. 276) lays down three propositions which he regards as having been established:—

"1. When a right of action, which would have existed if the work in respect of which compensation is claimed had not been authorised by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts.

"2. When damage arises, not out of the execution, but only out of the subsequent use of the work, then also there is no case for compensation.

"3. Loss of trade or custom, by reason of a work *not otherwise directly affecting the house or land* in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation."

The distinction here given as to when loss of trade or custom is not a proper subject of compensation does not include the present case: it is where the work does not directly affect the house or land in or upon which the trade has been carried on. Here the work did directly affect the house and land: it took away from it the right of access to the public street, and it was by reason of the loss of that right that the damages accrued to the business. Lord Selborne points out the exact nature of the claim in the *Ricket* case (7 App. Cas. at p. 281), and shews that "there was, therefore, no obstruction at all which could interfere with the direct access to or from" *Ricket's* house. Lord Selborne (p. 283) sets forth fully the particulars of the *Ricket* case and its progress through the Queen's Bench and Exchequer Chamber, which reversed the Queen's Bench decision: "When *Ricket's Case* came to your Lordships' House the judgment of the Exchequer Chamber was affirmed, Lord Chelmsford and Lord Cranworth concurring in the result, though not in all their reasons. Lord Westbury

**Chamberlain v. West End of London and Crystal Palace R.W. Co.* (1863), 2 B. & S. 617.

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dissented, calling in question the rule that the words 'injuriously affected', in the compensation clauses of the Lands and Railways Clauses Acts, mean only such a technical injury as would have been actionable if the work had not been authorised by the Legislature. Much of Lord Chelmsford's reasoning was founded upon a distinction between temporary and permanent damage under the 68th section of the Lands Clauses Act, and the 6th and 16th sections of the Railways Clauses Act, in which Lord Cranworth did not concur; and it certainly does not appear to me" (Lord Selborne) "that the decision of *Ricket's Case*, either in this House or in the Exchequer Chamber, can satisfactorily be explained by any such distinction. But both these noble and learned Lords agreed that the damage by loss of custom, of which the plaintiff complained, was a consequence of the works of the railway company, too remote and indefinite to bring it within the scope of any of the compensation clauses of the Acts."

He points out (p. 284) that the same view was taken of *Ricket's Case* by Willes and Byles, JJ., in the *Beckett* case, and that in the case then before the House (*Walker's Trustees*) as in the *Chamberlain*, *Beckett*, and *McCarthy* cases, the claim was made in respect of a direct and immediate injury to the trustees' estate by cutting off their direct and immediate access to the street.

The effect and meaning of this judgment, as I understand it, is that loss of trade is a proper ground for compensation when it arises by reason of the works directly affecting the house and land on which the trade is carried on. The reasoning of Lord O'Hagan in the *Walker's Trustees* case is to the same effect: he clearly distinguishes the *McCarthy* case from the *Ricket* case.

Lord Blackburn refers to the various decisions down to the *McCarthy* case, and holds that the cases shew that the right of access by a public way to land is a right attached to the land, and that, if any obstruction to the right of way occasions particular damage to the owner or occupier of that land by diminishing its value, an action which he might bring for that particular damage would be for an actual injury in respect of the land.

The effect of these decisions and especially of the *Walker's Trustees* case is that, where the land itself is injuriously affected by the removal of the direct approach to the premises, even under the Imperial Acts a claimant is entitled to compensation for loss directly arising from such cause.

Before leaving the English cases it may be well to refer to the authorities mentioned by Mr. Cripps in his *Law of Compensation*, 5th ed., p. 146 (note f), cases tending to shew that damage to trade or business cannot be allowed. In addition to those already referred to, he mentions *Re Penny and South Eastern R.W. Co.* (1857), 7 E. & B. 660; *Regina v. Vaughan* (1868), L.R. 4 Q.B. 190; *Bigg v. London Corporation* (1873), L.R. 15 Eq. 376; *Metropolitan Board of Works v. Howard* (1889), 5 Times L.R. 732; *Dublin Corporation v. Dowling* (1880), 6 L.R. Ir. 502.

In the *Penny* case depreciation in the value of property adjoining a railway by reason of the premises being overlooked by persons on the railway was not allowed, but injury from vibration caused by ballast trains during construction was recognised as a ground for compensation.

In the *Vaughan* case, the railway company served upon F., a tenant from year to year, a notice of their intention at the expiration of 6 months to enter and take the premises. F. claimed compensation for depreciation in the value of his interest, which had taken place since the expiration of the 6 months by reason of the execution of the company's works, the custom of the public house having been greatly reduced by the pulling down of the neighbouring houses taken under the company's statutory powers. The magistrate having refused to assess this item of compensation, on a rule to compel him to do so it was held that this depreciation was not the subject of compensation, and the claim had been rightly rejected. Cockburn, C.J., said (L.R. 4 Q.B. at p. 194): "It is quite clear the tenant cannot ask for compensation because the neighbouring property has been taken. The company might have done this by voluntary agreement quite independently of any statutable powers, and so destroyed the custom of the public house, and no action could have been maintained by him for the loss, inasmuch as no injury or trespass was done to him; consequently he could not have claimed compensation for this description of loss. This is an item of compensation not contemplated by the statute."

It is apparent that the *Vaughan* case is distinguishable from and not applicable to the present case.

In *Bigg v. London Corporation*, the 4th item of the plaintiff's claim was "for depression of the trade carried on by the plaintiff

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H. Adkins caused by the defendants' works, £150." Sir James Bacon, V.-C., said (L.R. 15 Eq. at p. 381): "There is not, strictly speaking, a particle of evidence that his trade has been in any degree depreciated; and it is clear that the plaintiff has no particular injury to complain of." He was allowed damages for the interference with his cellars, which was not authorised. The *Ricket* case was referred to by the Vice-Chancellor, who observed that it had gone far to settle the law in such cases; that remote and consequential damages cannot be claimed.

It is sufficient to distinguish this case from the one at bar to observe that there was no evidence of loss of trade, and it is to be considered having regard to the third proposition laid down by Lord Selborne in the *Walker's Trustees* case and the subsequent cases where it has been held that the destruction of a right of access is a ground for damage.

Metropolitan Board of Works v. Howard, 5 Times L.R. 732, was an appeal to the House of Lords from the decision of the Court of Appeal, *Howard v. Metropolitan Board of Works* (1888), 4 Times L.R. 591, affirming the judgment of Mr. Justice Denman in favour of the plaintiff. The claim was under the Lands Clauses Act, and was in respect of the injurious affection of the plaintiff's property by certain street improvements made by the defendants. The plaintiff was the tenant of a licensed public house in Bridge street, about 250 feet distant from old Putney Bridge. Bridge street was the main street on the Middlesex side of the Thames leading to old Putney Bridge. The Board built a new bridge a short distance up the river, and made a new thoroughfare on the Middlesex side leading to the new bridge. The old bridge was then closed, and Bridge street led down to the water only, and in consequence the traffic, which formerly went along Bridge street past the plaintiff's public house, was diverted at a point before the plaintiff's house was reached, and passed along the new thoroughfare and so over the new bridge. The plaintiff claimed compensation in respect of his property being "injuriously affected" by the works carried out by the defendants, and on the inquiry before the jury the plaintiff produced evidence that in consequence of the diversion of the traffic the trade of the public house had greatly diminished. The jury awarded the plaintiff £1,031 compensation. Upon the hearing of the action, the

defendants contended that the inquisition was bad, as it found solely, or to a great extent, money due to the plaintiff for loss of profits of the trade, which could not be the subject of compensation, the only subject for compensation being the depreciation in the value of the premises. Mr. Justice Denman, who tried the case, held that he was not justified in treating the inquisition as a nullity, and gave judgment for the plaintiff. The Court of Appeal affirmed the decision of the learned Judge, and Lord Herschell gave the judgment of the House dismissing the appeal, saying (5 Times L.R. 732) that he "did not think it could be doubted that an interference of this character with the access to the house of the respondent by means of thus dealing with the road or highway on which it was situated was an injurious affecting of his premises which would give him a right to compensation if those premises had been rendered less valuable than they were before." This case, below, is reported in 4 Times L.R. 591, where the *McCarthy* case and the *Walker's Trustees* case were referred to. In dismissing the appeal, the Master of the Rolls said: "The case came within the 4th proposition laid down by Lord Selborne in the *Walker's Trustees* case that 'the obstruction by the execution of the work of a man's direct access to his house or land, whether such access be by a public road, or by a private way, is a proper subject for compensation.' In considering that matter it would not be right to regard the house solely as a public house, but it would be equally wrong to exclude the fact that the house was in a position to be used, and was used, as a public house . . . It was not clear that the jury had not used the evidence as to the diminution of trade in considering the question of the depreciation in value of the house. Such evidence was always given and could not be shut out." Lopes, L.J., concurred. In his opinion, the "house was injuriously affected by the execution of the works, and the jury awarded compensation, not for the loss of trade, which would not, *per se*, be a legitimate head of damage, but for the deterioration in value of the house as measured by the loss of trade."

As the result of the cases under the Lands Clauses Act and Railways Clauses Acts (Imperial), the claimant would in the present case be entitled to a claim for compensation for deterioration in the value of the premises, in which evidence of the loss

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of trade would be admissible, although possibly not allowable *per se*. It would be a question whether or not it could be rejected under the 3rd proposition as laid down by Lord Selborne in the *Walker's Trustees* case.

In my opinion, the effect of the 3rd proposition would not be to exclude the claim for damages for loss of trade. However that may be, I think it clear that, having regard to our statute, the claim is well supported. The claim clearly arises under the very language of the statute. The claimant is entitled to full compensation for all damage by her sustained by reason of the exercise of such powers. There is no decision, as I understand the cases, in our own Courts to militate against this view. The *Powell* case has been already referred to.

In *St. Catharines R.W. Co. v. Norris* (1889), 17 O.R. 667, compensation was sought for the loss of local custom to and from a mill, not arising from the construction of the railway, but from a subsequent user of it. It was held that the damages were too remote, and Galt, C.J., said (pp. 671, 672): "In the case of *Caledonian R.W. Co. v. Walker's Trustees*, it was manifest that the property in question had been seriously affected by the closing of access to a principal thoroughfare in Glasgow; and in the case of *Metropolitan Board of Works v. McCarthy*, it was clear his property had been very much lessened in value. In the case now before me no such damage was suggested. All that was urged before the arbitrators, or at any rate all on which their award is based, was that there was a speculative loss of local custom not arising from the construction of the railway but from the user of it." It also appeared to the Court, from the findings of the arbitrators themselves, that the damages were altogether too remote and speculative (p. 672).

In *Re Toronto Hamilton and Buffalo R.W. Co. and Kerner* (1896), 28 O.R. 14, the arbitrator found that the claimant had suffered no damage. Ferguson, J., on appeal, said (p. 19): "In the present case no sum was awarded. It cannot be said that the award exceeds \$400, and I am of opinion that, as an appeal, this appeal does not lie. . . ." He stated (pp. 19, 20) that he thought there might be ground for separating the claim for \$189, on the authority of *Ford v. Metropolitan R.W. Co.* (1886), 17 Q.B.D. 12, if the English Railway Act on the subject was the same

in effect as the Act of 1888 (Dominion), but was of the opinion that the Acts were materially different so far as the question there involved was concerned.

The case of *Leblanc v. The King*, 16 Can. Ex. C.R. 219, was referred to. In that case, the Crown had substituted for a level street crossing a permanent subway, which resulted in a material change in the level of the street opposite the property of the suppliant, who claimed both damages to his property and loss of business. Audette, J., held that, where no land is taken, the owner of property on such a street is precluded from recovering for loss of business, and referred to the decision by himself in *The King v. Richards* (1912), 14 Can. Ex. C.R. 365, where he held that the damages which a suppliant can recover are only those which would affect or would go to decrease the market value of the property.

These last two are the only cases which I have found where it has been so held in Canada, and it does not appear in the *Leblanc* case whether evidence of loss of business and trade was tendered as entering into the depreciation of the value of the land.

Re Meyer and City of Toronto (1914), 30 O.L.R. 426, 19 D.L.R. 785, was an appeal by the claimants from the award of the arbitrator, to increase the damages, under the Municipal Act, for the expropriation of a parcel of land on the Lake Shore, upon which were erected a restaurant, boat-house, and dining-hall. The arbitrator found the value of the land and allowed in addition thereto \$15,500 for business disturbance. Upon an appeal to this Court, the finding of the arbitrator was sustained and the appeal dismissed. Hodgins, J.A., gave the judgment of the Court dismissing the appeal. The cross-appeal was abandoned. It was held that the profits which are being earned are undoubtedly an element to be considered in deciding as to the value of the land and as demonstrating the use to which it may reasonably and advantageously be put, and as giving it unique and special value. In arriving at the amount of profits, salaries for the claimants, a fair rental, and an allowance for depreciation, were held to be properly chargeable against the business; and an allowance of three years' profits for the diminution of the business was held to be, in the circumstances, sufficient—the value of the land and

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buildings having been based really on the amount of the annual profit.

In *City of Toronto v. J. F. Brown Co.*, 55 Can. S.C.R. 153, 37 D.L.R. 532, it was held under the Municipal Act, sec. 325, that where there is injurious affection within the meaning of sec. 437, the owner is entitled to compensation, though none of his land is taken and no right or privilege attached thereto interfered with.

To sum up my conclusion on the examination of the cases, I am of opinion that the plaintiff is entitled to damages in the present case under the Canadian Railway Act, sec. 155; that the evidence shews that the damages arose directly from the execution of the works, and were in addition to the amount allowed as represented by the value of the property as it existed before and after the building of the subway. It was not argued that the amount allowed, if the plaintiff was entitled to any sum for loss of business, was too large.

In the case of *Re Hannah and Campbellford Lake Ontario and Western R.W. Co.* (1915), 34 O.L.R. 615, 25 D.L.R. 234, it was held by Riddell, J., that the proper method is to ascertain the value of the whole parcel of which part has been taken and the value of the remaining portion after the taking and deduct the one from the other: the difference is the compensation to be allowed.

There is no case deciding the method on the facts disclosed in the case at bar, nor do I think the rule laid down in the case just cited is applicable to the present case. If that rule were strictly applied, it would preclude the loss which might and which in this case largely did occur during the progress of the work.

Proceedings were taken with a view to commencing the work on the subway in question as early as 1913, and the work actually began in May, 1914.

The evidence shews that the business was increasing until the defendants commenced the subway in 1914, when it seemed to go back. The claimant says "she lost her trade and put her out of business;" "the people would not come up to buy." She continued the business up to 1918, when she sold the premises.

The evidence of the loss of business, upon the facts in this case, was properly admissible and very important on which to base the claimant's loss.

I can find no authority except the *Meyer* case which would warrant the arbitrator in accepting the three years' loss of business as the measure of loss which should be added to the depreciation of the property. The loss thus shewn by the evidence should be taken into account in ascertaining the total compensation to which the claimant is entitled. It forms an important element in considering damages, but cannot be taken in itself as the sum which should be added to the depreciation in the selling price of the property.

The case should go back to the arbitrator to ascertain the entire compensation to which the claimant is entitled, and in doing this he will consider the evidence of the loss of business and make such allowance therefor, as forming part of the compensation to be allowed, as he may think just under the circumstances.

Costs of this appeal and the costs of the reference back to be costs in the cause.

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MULOCK, C.J. Ex., and SUTHERLAND, J., agreed with CLUTE, J.

KELLY, J.:—It is not seriously contested that the works constructed by the company were legally authorised and executed and that the proceedings for arbitration were properly brought under the statute. The question therefore comes down to this: has the plaintiff suffered injury of the kind for which the statute authorises the making of compensation, and, if so, for what is such compensation recoverable and what was the extent of the injury?

It seems beyond question that the construction of the works by the company has materially interfered with access to the property from the public street, and that its value, irrespective of any particular use which could have been made of it, is so dependent upon the existence of that access as to be substantially diminished by that interference. This, independently of what, if any, rights accrue to the owner from any other acts of interference found by the arbitrator, entitles her to compensation, under sec. 155 of the Railway Act, R.S.C. 1906, ch. 37.

As respects the land itself, the arbitrator has placed the damage at \$6,366, the difference between what he finds was the value before the commencement of the work done by the company, and the value afterwards arrived at by taking the net proceeds of the

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sale made in February, 1918. The actual selling price was \$3,100, but the arbitrator, in fixing the amount, deducted not this sum, but the net proceeds of the sale (\$2,908), arrived at by deducting from the \$3,100 the costs of sale, legal expenses, etc. Except in respect of this deduction, I am of opinion that we should not, on the evidence and following recent decisions binding upon us as to the weight to be given the findings of an arbitrator in such cases, be justified in disturbing the amount stated by the arbitrator as the damage to the property itself. That item of the award should be reduced to \$6,174 (\$9,274—\$3,100).

As to the damage for injury to business, I am of opinion, after a careful examination of the authorities, both English and Canadian, and from a comparison of the language of the sections of the English Acts on which the English cases have been decided, with the language of sec. 155 of the Dominion Railway Act, that the present case does not necessarily fall within any of the authorities cited, or which I have been able to find, declaring against allowance of compensation for injury to business. Section 155 is wider in its terms than the sections (taken together) of the English Acts referred to. So, too, the facts of the present case are quite distinguishable from those of the cases relied upon—such as *Powell v. Toronto Hamilton and Buffalo R.W. Co.*, 25 A.R. 209, which was urged as an authority binding upon this Court, but which presents an altogether different state of facts. Upon a perusal of the reasons for judgment in that case, it will be observed that the decision was based mainly upon the ground that there was no interference with the property itself, or with access to it, and that compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the estate or land itself, and not on personal inconvenience or discomfort to the owner or occupier. Here, in the exercise of the powers possessed by the company, there was interference with the property and consequent damage; and the company, by sec. 155, is required to “make full compensation” to the owner for all damage by her sustained “by reason of the exercise of such powers.”

I have had the advantage of reading the exhaustive judgment of my brother Clute in the present case, and I agree in his analysis of the decisions and in the conclusion that, in the circumstances presented, this property-owner is entitled to compensation for

interference with and consequent loss to her business. I also agree that the method adopted by the learned arbitrator in arriving at what that compensation should be was not the proper one, and that there should be a reference back to ascertain the compensation, in the manner indicated by my brother Clute.

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RIDDELL, J.:—The Canadian Pacific Railway Company, being ordered to construct a subway in Yonge street, in the city of Toronto, were compelled to cut down the street for some distance on each side of their line to form a suitable grade; in so doing they interfered permanently with convenient access to the store of the claimant, a short distance north of their line.

The parties entered into an agreement to submit to Mr. Coatsworth, K.C., "the compensation to be paid to her by reason of the construction of the subway." While this submission is not formally under the Railway Act, the arbitration has been considered by all parties as being under that Act, and there is an express provision that "an appeal shall lie from the . . . award under the provisions of the Railway Act and amendments thereto."

The arbitrator awarded compensation under two heads:—

For the property.....	\$6,366
For the business.....	4,500

\$10,866

The railway company now appeal.

The claimant bought the land, which is on the west side of Yonge street, in 1908, for \$4,500, having been lessee for some years and having carried on a confectionery business in the store on the lot, which is 14½ frontage by a depth of 100 feet.

In May, 1914, the railway company excavated the highway the full width close up to the claimant's store, leaving her store some 5 feet from the surface of the street at the north and 5 feet 6 inches at the south. It was consequently inaccessible from Yonge street. Steps were put on the street leading up to the store, but the business fell off, as was to be expected; and at length she determined to sell the property. She sold by public auction for \$3,100, but the legal and other expenses reduced the net proceeds to \$2,908.

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Mr. Coatsworth, finding the value of the land before the work to have been. \$9,274.00
deducts from this the net proceeds. 2,908.00

and finds as compensation the balance. \$6,366.00

Three objections are raised to this estimate: (1) that the value \$9,274 is too high; (2) in any event, the gross, not the net, proceeds are the value of the land after the work; and (3) a considerable part of the decrease in value was due to another cause, i.e., the removal of the Metropolitan Railway station further north.

I think that the arbitrator was fully justified in finding the value to have been \$9,274. We should not interfere except in a clear case: *Ruddy v. Toronto Eastern R.W. Co.* (1917), 38 O.L.R. 556, 33 D.L.R. 193, in the Judicial Committee.

As to the second point, no doubt the rule in cases where some land is taken is as laid down in this Court in *Re Hannah and Campbellford Lake Ontario and Western R.W. Co.*, 34 O.L.R. 615, 25 D.L.R. 234. The true method of determining the amount of compensation is to deduct the value of the whole land after from the value before, the difference being the compensation to be allowed. There is no reason why the same rule should not be applied in the present case. The value before and the value after the work should be computed on the same basis—if the former value be computed as gross, so should the latter, and, if net, net.

There is nothing to indicate that the witnesses for the claimant in giving their estimate of \$9,274 were not giving it as the amount it should bring if sold, the market, commercial, or pecuniary value without deduction of costs and expenses of sale. There was nothing to compel the claimant to sell out as she did; I mean nothing in law, for we cannot take account in such matters of personal considerations; and there is nothing to shew that, if she had before the work desired to turn her property into cash, she could have done so at less expense. I think we must consider the values of the land before and after as gross:

Value before.	\$9,274
“ after.	3,100

Diminution in value.	\$6,174
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I think we cannot reverse the finding of the arbitrator that all the loss in value of the land is due to the work; and the third ground of appeal on this head therefore fails.

The real and substantial ground of appeal, however, is as to the amount allowed for loss of business for three years.

Where no land is taken, but simply it is injuriously affected, it is well-settled that no compensation for loss of business can be allowed under the Imperial Land Clauses Act of 1845. The only damages recoverable are such as are referable to the land itself and not to the person or business—the same rule has been laid down in Canada in such cases as the present: *Leblanc v. The King*, 16 Can. Ex. C.R. 219. (I am informed by the Registrar of the Exchequer Court that this case has not been appealed to the Supreme Court, but that the parties have accepted the judgment.)

The arbitrator has given the meaning of “land taken” as he views it:—

“A very general and it appears to me erroneous impression prevails that the taking of land by a company, in such an undertaking as the construction of this subway, must be the physical deprivation of the claimant of a portion of the soil and superficial area of the land itself. This appears to me too narrow a construction, because land includes not only the area which it measures and the soil thereon, but the buildings and certain rights of way, rights of access, right to lateral support, and other rights which are appurtenant to and in my view form part of the land. The Act respecting Short Forms of Conveyances, R.S.O. 1914, ch. 115, sec. 2, clause (a), defines land as follows: “‘Land’ shall include freehold tenements and hereditaments, whether corporeal or incorporeal, and any undivided part or share therein.’ This definition confirms what I have above stated, that all the rights which go to make the land available for use are part of the land itself, and therefore to take all or any of them is to take all or part of the land in fact. What was the condition in the present case was that right of access to the land was completely taken away by the excavation; also the right of lateral support was entirely taken; also the right of way in the rear to Birch avenue was taken by the extension of the excavation westward along Birch avenue. These among other rights which tended to make the claimant's land available for practical purposes and for the use of her business

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were practically entirely taken away, and her place was left, so to speak, up in the air, with no means of reaching it; and consequently I find that, when the contestants, in the exercise of their rights and duties in connection with the construction of the said subway, took of the claimant's lands for that purpose, the claimant was entitled to damages for the disturbance to her business so far as it was directly connected with the property itself."

The difficulty in the way of accepting this reasoning is, I think, insuperable. In the Lands Clauses Consolidation Act of 1845, 8 Vict. ch. 18, sec. 3, "the words 'lands' shall extend to messuages, lands, tenements, and hereditaments of any tenure;" our Railway Act, R.S.C. 1906, ch. 37, sec. 2 (15), says: 'Lands' means the lands, the acquiring, taking or using of which is authorised by this or the special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure"—definitions practically identical.

The Judicial Committee has laid down an authoritative rule for our Courts in *Trimble v. Hill* (1879), 5 App. Cas. 342: where a Colonial Legislature has passed an Act like to one passed by the Imperial Parliament, the Colonial Courts should govern themselves by an authoritative decision in England on the Imperial Act: see p. 344.

Without discussing whether an easement can come under the word "land" in this section, and, if so, which kind of easement (as to which much has been said)—*Pinchin v. London and Blackwall R.W. Co.* (1854), 1 K. & J. 34; *S.C.* (1854), 5 DeG. M. & G. 851; *Great Western R.W. Co. v. Swindon and Cheltenham R.W. Co.* (1884), 9 App. Cas. 787; *Falkner v. Somerset and Dorset R.W. Co.* (1873), L.R. 16 Eq. 458; *Ramsden v. Manchester South Junction and Altrincham R.W. Co.* (1848), 1 Ex. 723 (perhaps the last word has not been said)—it may be said that it has been authoritatively decided that no one can claim for an easement annexed to his land except by way of claiming for his land as "injuriously affected."

In *Macey v. Metropolitan Board of Works*, 33 L.J. Ch. 377, the plaintiff owned land adjoining the Thames, and therefore had the right to free access to the Thames, etc., etc.: the Metropolitan Board of Works began to fill up the river in front of his wharf, and he applied for an injunction on the ground that they had

entered on his "lands" without paying or offering compensation under sec. 84 of the Act. The Court held that the act of the Board was not a taking of land, "a substantial right" was to be taken away, "but it is not a right in any land which this Board is going to take, it is simply the right which any householder possesses in a street or other highway—a right, in common with the public, to pass along that highway; a right, separate from the public, of entering his own house from the highway. . . . If a person . . . is prevented from entering his house, he has a real wrong done to him by having that access interfered with; but that right of access surely is not a right or privilege in, over, or affecting lands." This was held to be injuriously affecting, not a taking of, lands, even though the special Act said that the word "lands" should include "easements, interests, rights and privileges in, over, or affecting lands" (p. 381.)

This case has been consistently followed: e.g., *Clark v. School Board for London* (1874), L.R. 9 Ch. 120; *School Board for London v. Smith*, [1895] W.N. 37; *Wigram v. Fryer* (1887), 36 Ch. D. 87, at p. 96; and it is too late to attempt to change the rule. Browne & Allan, *Law of Compensation*, 2nd ed., p. 144, put it thus: "In the case of injuriously affecting merely, under which is included the disturbance of easements;" and I agree with them.

It is well established that, where the only claim is for injuriously affecting lands, no allowance can be made for loss of business, goodwill, etc.: *Ricket v. Metropolitan R.W. Co.*, L.R. 2 H.L. 175; "though the profits of the occupier were diminished or destroyed" (p. 198.) "The damage complained of must be one which is sustained in respect of the ownership of the property,—in respect of the property itself, and not in respect of any particular use to which it may from time to time be put: in other words, it must . . . be a damage which would be sustained by any person who was the owner, to whatever use he might think proper to put the property: *Beckett v. Midland R.W. Co.* (1867), L.R. 3 C.P. 82, *per* Willes, J., at pp. 94, 95; "a damage in respect of some particular use of the premises to which they might be put by one occupant, but to which they would not be put by another . . . a damage in respect of loss of custom or of goodwill . . . was rejected by the House of Lords in *Ricket's Case*" (p. 95).

Wadham v. North Eastern R.W. Co. (1884), 14 Q.B.D. 747, is a

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case where a railway company stopped up a street in which were a house and premises used as a hotel, whereby the value thereof for using, selling, or letting as a hotel was diminished—the Court held, “You are not, in calculating the damage for injuriously affecting the premises, to take into account any special and exceptional value which the premises may have in the possession of the then proprietor” (p. 752, *per* Mathew, J., Day, J., concurring).

Many other cases to the like effect are to be found in Cripps’ Law of Compensation, 5th ed., pp. 146, 147, notes (f), (g), (h), (k).

The same rule has been followed in our Courts and in very many cases has been taken for granted: indeed this is the first time in my experience that the point has ever been argued. There are a few cases reported.

In *St. Catharines R.W. Co. v. Norris*, 17 O.R. 667, nothing was allowed for what was “calculated . . . to interfere with the trade of the owner” (p. 671).

In *Re Toronto Hamilton and Buffalo R.W. Co. and Kerner*, 28 O.R. 14, damages for “personal inconvenience” were disallowed, following *Ford v. Metropolitan R.W. Co.*, 17 Q.B.D. 12, in which, p. 25, it is laid down that “injuries sustained by the plaintiffs personally, injuries sustained by them in carrying on their business . . . must not be regarded.”

Leblanc v. The King, 16 Can. Ex. C.R. 219, 38 D.L.R. 632, takes the rule as of course; on p. 221 a number of cases are cited, to which reference may be made.

Powell v. Toronto Hamilton and Buffalo R.W. Co., 25 A.R. 209, is a decision of the Court of Appeal, and therefore binding upon us—it is there held that under the Dominion Railway Act compensation recoverable in respect of land injuriously affected must be based upon injury or damage to the land itself and not on personal inconvenience to the owner—the cases are there fully discussed.

Re Meyer and City of Toronto, 30 O.L.R. 426, 19 D.L.R. 785, is *nihil ad rem*. There the land was taken, and it was held that the profits which are being earned are undoubtedly an element in deciding as to the value of the land and as demonstrating the uses to which it might reasonably and advantageously be put and as giving it a unique or special value—it did not at all lay down

the rule that where land is injuriously affected three years' profits or any profits should be allowed; nor that profits can be allowed *simpliciter*. In the present case, no doubt, the valuation of the land, before the work, was made in view of the unique and special value of the particular site; and of course the purchase-price when the land was sold was determined in view of the destruction of that value.

I am of opinion that the arbitrator erred in allowing three years' profits as he has done. There is, however, one matter in the consideration of which the loss of profits might be considered material, were it not for express adverse authority. Under the English Lands Clauses Act, where no land is taken but land is injuriously affected, there is clear authority for saying that the land-owner is not compelled to take proceedings under sec. 68 once the work is begun or threatened, but may wait until the completion of the work to advance a claim: "Where land is taken, the land should be taken, and its value ascertained, and then the additional inconvenience that is caused could be estimated. But when you have only to estimate the damage done by a particular work, it is more convenient to ascertain it after the damage is done than before:" *Macey v. Metropolitan Board of Works*, 33 L.J. Ch. 377, at pp. 383, 384. See also *Hutton v. London and South Western R.W. Co.* (1849), 7 Hare 259; *Temple Pier Co. v. Metropolitan Board of Works* (1865), 34 L.J. Ch. 262; *Regina v. Poulter* (1887), 20 Q.B.D. 132; *Delany v. Metropolitan Board of Works* (1867), L.R. 2 C.P. 532; *S.C.* (1867), L.R. 3 C.P. 111.

By a parity of reasoning, any arbitration to determine the extent of damage where the land is not taken should be after the work is done. It would seem reasonable that the damage should be assessed at that time, and I know no reason why the damage in the meantime should not be a subject of compensation. The only damage proved, however, is loss of profits: and that has been held "too remote and indefinite to bring it within the scope of any of the compensation clauses of the Acts:" *Metropolitan Board of Works v. McCarthy*, L.R. 7 H.L. 243, at p. 253; *Ford v. Metropolitan R.W. Co.*, 17 Q.B.D. 12, at pp. 23, 24; *Ricket v. Metropolitan R.W. Co.*, L.R. 2 H.L. 175.

I am of opinion that we are bound by authority to hold that these profits cannot be allowed.

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The amount of the award should be reduced to \$6,174, and the respondent should pay the costs of appeal.

The order of the Court (RIDDELL, J., dissenting) was as follows:—

1. This Court doth declare that the claimant is entitled to be allowed compensation for the loss of business occasioned to her by the execution of the work in question in this matter as part of the compensation to be allowed her, but that the basis upon which the said arbitrator fixed the amount to be allowed for such loss of business was erroneous; and doth adjudge the same accordingly.

2. And this Court doth order that the said award be and that the same is hereby set aside, and that this matter be referred back to the arbitrator to ascertain the entire compensation which the claimant is entitled to recover, including as part of said compensation such damage for loss of business as he may under the circumstances think fit to allow, having regard to the declaration aforesaid.

3. And this Court doth further order that the costs of this appeal and of the reference back shall be costs in this matter.

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[APPELLATE DIVISION.]

Jan. 10.

RAYMOND v. TOWNSHIP OF BOSANQUET.

Highway—Nonrepair—Accident to Motor-vehicle—Injury to Passenger—Curved Approach to Narrow Bridge—Building Material Standing on Highway—Duty of Township Corporation—Evidence—Failure to Shew Breach—Municipal Act, R.S.O. 1914, ch. 192, sec. 460 (1)—Proximate Cause of Accident—Findings of Trial Judge—Reversal on Appeal.

The judgment of MEREDITH, C.J.C.P., 43 O.L.R. 434, was reversed (CLUTE, J., dissenting).

It was *held*, by the majority of the Court, upon the evidence, that the defendants, a township corporation, in respect of the bridge and highway complained of by the plaintiff, were guilty of no breach of the duty to keep in repair, imposed by sec. 460 (1) of the Municipal Act, R.S.O. 1914, ch. 192.

Per KELLY, J.—The predicament in which the plaintiff and his companions found themselves, when travelling in a motor-vehicle upon the highway, was attributable to some other cause than the narrowness of the bridge, the curve from the roadway leading to the bridge, or the presence of piles or logs on the highway.

Per CLUTE, J.—There was sufficient evidence to support the findings of the trial Judge: the evidence established that the road was not reasonably safe, and that its defective condition was the proximate cause of the accident.

APPEAL by the defendants from the judgment of MEREDITH, C.J.C.P., 43 O.L.R. 434.

November 28, 1918. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

I. F. Hellmuth, K.C., and *A. Weir*, for the appellants, quarrelled with the findings of the trial Judge and argued that he should have found on the evidence that the turn from the gravelled road on to the bridge could easily and safely be made. Counsel denied that the bridge or highway was out of repair. On the contrary, the evidence shewed that both were in good condition for automobile or other traffic. The accident was due to excessive speed of the motor and to the negligence of the driver. They referred to *Davis v. Township of Usborne* (1916), 36 O.L.R. 148, 28 D.L.R. 397, and *German v. City of Ottawa* (1917), 39 O.L.R. 176, 34 D.L.R. 632, 56 Can. S.C.R. 80, 39 D.L.R. 669.

J. M. McEvoy and *E. W. M. Flock*, for the plaintiff, respondent, relied upon the judgment appealed from, and contended that the bridge was so narrow and the turn on to it so sharp as to constitute a danger to those driving over it. They also said that the highway was obstructed by piles of logs placed upon it by the appellants, and that maintaining the bridge and highway in such condition was a breach of the appellants' statutory duty, rendering them liable.

Hellmuth, in reply.

January 10, 1919. KELLY, J.:—The plaintiff claims damages for personal injuries sustained in a motor-car accident upon a highway in the township of Bosanquet, in the county of Lambton. The claim is based upon the duty resting upon the defendants under the Municipal Act, R.S.O. 1914, ch. 192, sec. 460 (1), which provides: "Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default, the corporation shall be liable for all damages sustained by any person by reason of such default."

The accident happened on the 26th July, 1917. This action was begun on the 27th August, 1917; the trial was before the Chief Justice of the Common Pleas without a jury on the 29th and 30th April, 1918; and judgment was given on the 7th August, 1918, awarding the plaintiff for all pain and suffering and for loss in a business way \$1,500, and for out of pocket payments \$250, subject

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to the right reserved to him "to prove to the trial Judge the actual amount thereof, such sum to be substituted for the said sum of \$250."

The amount claimed by the statement of claim was \$2,000, but at the trial application was made to increase this to \$20,000, on the allegation by the plaintiff that his injuries were much greater than they were thought to be when the statement of claim was delivered. In his reasons for judgment the learned Judge says that he then granted leave to amend.

On the 26th July, 1917, at about 5.30 in the morning, several members of a fishing club, including the plaintiff, left London in motor-cars to go to Kettle Point, in the township of Bosanquet, on the shore of Lake Huron. The car in which the plaintiff rode—a 7-passenger Chalmers, with a wheel base said to be 124 inches—was owned and driven by Mr. Keene, the other passengers in it being Mr. Flock and Dr. Routledge. At about 7.30 or 8 a.m. (the witnesses do not agree on the exact time) this car and a smaller car, in which were other members of the fishing party, had reached the township of Bosanquet, and were proceeding northerly from Ravenswood on the highway on which the accident happened. Approaching the place where the accident occurred, there is, on the west or left hand side of the roadway and within the limits of the road allowance, an open ditch or stream. Several years ago this roadway continued along the easterly side of this stream or ditch northerly from the place of the accident, but the waters flowing therein so cut into and washed away the earth as to make that part of the roadway unsuitable for traffic; and the municipal corporation, to overcome the difficulty, diverted the roadway, crossing over the stream or ditch by means of a bridge then existing (the bridge in question) to the westerly side of the ditch on to a roadway which was then laid out from the bridge northerly along this side, upon land acquired by the municipality for that purpose.

On the roadway by which the plaintiff's party approached the bridge, there is, at some distance to the south, a hill or incline sloping towards the north. The foot of this incline is about 200 feet southerly from the bridge, the length of the incline itself being about 300 feet.

The roadway is gravelled, and from the top of the incline one

can easily observe the line of the road, the turn to the west at the bridge, and the roadway leading northerly from the westerly end of the bridge. After the traffic was diverted across the bridge, a fence or barricade was thrown across the part of the roadway which thereafter ceased to be used, on a line from about the north-easterly corner of the bridge easterly to the fence forming the easterly boundary of the road allowance. This also is observable by persons coming down the incline.

When the car in which the plaintiff was travelling reached the curve westerly on to the bridge, the driver, according to his own evidence, commenced to make the turn; but, instead of following the driveway across the bridge, the car proceeded towards and ran into the guard railing along the north side of the bridge, carried away part of it and the post by which it was supported at the north-easterly corner of the bridge, and went into the ditch.

The further evidence of the driver (Mr. Keene) is that, when he came to the curve from the roadway to the bridge, he thought that the turn was too sharp to permit of his car passing over the bridge in the usual way, and, fearing that it would be thrown sideways over the edge, he made a sudden turn to the right, and thus went into the ditch.

There is evidence of more than one witness who was on the scene soon after the accident that the right front wheel of the car at no time reached the bridge, but ran on a line about 4 feet east of the post referred to. The driver, who does not agree with this latter evidence, and others in the car, attribute the happening to the difficulty, or the impossibility—as some of them put it—of making the turn on to the bridge because of what they say was the sudden and sharp curve and the insufficient width of the bridge.

Mr. Farncomb, the surveyor who made the plan, exhibit 1, and who was called for the plaintiff, has this to say in cross-examination:—

“Q. Approaching the turn the ground is practically level, I think you said. A. This is shewn.

“Q. So that the whole 18 feet in width there would be quite level up towards the turn? A. 18 feet at the turn is level.

“Q. And that would be clear of the 12 feet?

“His Lordship: 18 and 12—would it not be 30 feet?

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"Mr. Weir: Q. On the other side of the ditch it is level?

A. Yes.

"His Lordship: The part between the fence and the ditch is all level? A. Directly opposite the bridge it is level."

According to the evidence of Mr. McCubbin, who made measurements and prepared a plan, exhibit No. 3, and at the trial verified it, the width of the bridge between the inside lines of the railings is 13 feet, the width of the gravelled roadway approaching the bridge from the south varies from 12 to 15 feet; the centre line of the gravelled roadway as it turns on to the bridge forms a segment of a circle whose radius is 25 feet, and the radius of the curve drawn about 3 feet from the outside of the gravel is about 30 feet. At the trial this witness put it this way:—

"Q. Generally speaking what is the width of the gravel there?

A. From 12 to 15 feet.

"Q. What is the radius of curvature? A. Just as marked on the plan; following the centre of the roadway to the continuation at the centre of the bridge, the radius of the centre line is 25 feet.

"Q. And a little further out than the centre? A. Keeping about 3 feet in from the outside, the radius is 30 feet.

"Q. What do you say as to whether that is the usual curvature in a place of that sort? A. It is about the ordinary condition you will find at the crossing of two roads in a rectangular system of surveys.

"His Lordship: Is the road allowance 66 feet? A. Road allowances are 66 feet, roadways of an ordinary width to travel on.

"Q. But surely where you run into a narrow lane like that it is different? A. The curvature here would be just about the same curvature on the travelled portion of two roads where you make a right angle turn from one to another."

And at p. 72 of the notes of evidence:—

"Mr. Weir: At ordinary intersections of highways, where one highway intersects another, would that be the usual curvature?

A. Just about as you have it here.

"Q. Just about the usual thing? A. Yes.

"Q. The bridge was 13 feet between railings? A. Yes.

"Q. What is the ordinary width of the travelled track? A. Of the ordinary gravelled roadway?

"Q. Yes. A. About 12 feet.

"Q. About 12 feet is the width of the ordinary gravelled roadway? A. Yes."

The length of the bridge (by scale on exhibit 3) is about 13 feet. Exhibit 3 shews the floor of it to contain 11 planks of a width of 14 inches each.

There is evidence that the speed at which the plaintiff and his party were travelling, down to the time they reached the top of the incline, was, at times, very high—indeed excessive; one of the occupants of the car, speaking of the rate they had travelled, in answer to questions by the Court in which 30 miles per hour was mentioned, said they were travelling at about an average speed; that they had gone at some places faster than at others.

"His Lordship: Would you say you did not go at the rate of 40 miles per hour anywhere? A. I believe we did about Adelaide village, the only spot where we were going at what I think was a fast rate. Except at that one place we were not going 40 miles anywhere; that was a good many miles further east."

I do not find in the evidence any statement that the rate of speed after they started down the incline was excessive.

There can be no question that the turn in the road and the bridge could be seen for a very considerable distance before reaching that point. Mr. Flock, a fellow-passenger of the plaintiff, says that they could see the turn in the road when they were about half way down the incline, and probably 200 to 250 feet before making the turn, and that the gravel on the road was wide enough for two vehicles; and Keene says he saw the turn a few hundred feet away.

Briefly what is complained of is that the bridge was so narrow and the turn from the gravelled roadway on to it so sharp as to constitute a danger to those driving over it; and also that the highway was obstructed by piles or logs placed thereon by the defendants; and that maintaining the bridge and highway in such condition was a breach by the defendants of their statutory duty, rendering them liable.

On the argument it was not urged that there was otherwise want of repair. Much importance was attached, in the presentation of the plaintiff's case, to the presence of the piles or logs above referred to, which the evidence says were upon the right of way to

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the right of the gravelled portion of the road at the turn. It was sought to be shewn that these interfered with Keene's car properly making the turn on to the bridge. How far there was such interference may be inferred from the fact that according to occupants of the car—the driver and Mr. Flock—these piles or logs were distant about 3 feet from the travelled portion of the road. Mr. Flock says that they were within 3 feet of the gravel; and Keene says:—

"Q. Did you notice the position of these posts or whatever they were, that were lying there? A. They were alongside the road.

"Q. So you agree with what Mr. Flock said? A. Yes, I think they were alongside.

"Q. At the distance he speaks of? A. I don't know what distance he spoke of.

"His Lordship: 3 or 4 feet? A. That would be right.

"Mr. Weir: That would be right? A. Yes."

The driver intimates that it was necessary to keep to the right at this point to enable him to make a wider turn on to the bridge; hence the alleged interference.

In effect the learned trial Judge found that there was no negligence by the plaintiff and none by the driver of the car, or in any event none for which the plaintiff could be held responsible; and that maintaining the bridge and roadway leading on to it in the condition it was at the time of the accident, was a breach of the statutory duty to repair.

Assuming for the moment the correctness of the finding in favour of the plaintiff and the driver of the car, the question arises whether the bridge with the approach to it was, at the time, in such condition, under the circumstances in which it was ordinarily used, and having regard to the extent and character of the traffic which passed over it, as was reasonable for its purposes. As to this there is an overwhelming amount of uncontradicted evidence by many persons with intimate knowledge of the situation extending over many years; residents of the locality who habitually made use of it for purposes of ordinary traffic of various kinds; others who made frequent use of it for motor-traffic, particularly during the summer months, and others as well, who, unfamiliar with the road and ignorant of and unwarned of any possible danger from its condition, travelled over it for the first time in

motor-cars and experienced no difficulty in making the turn on to or in passing over the bridge.

Several witnesses speak of the heavy motor-car traffic; that cars of all kinds passed that way; and there is the testimony as well of several who had the actual experience of using it with motor-cars, some driven by the witnesses themselves and some in which the witnesses were merely passengers.

There is also evidence as to other kinds of traffic, such as with a threshing outfit—in one instance a traction engine with a water-tank hitched behind it, the total length being 33 feet, and again a threshing separator, with a buggy connected to and drawn from the rear—going over it without difficulty, the length of the two being 40 feet, and of the separator itself 36 feet.

It will be observed that the length of Keene's car is sworn to as being about 13 feet; he himself says, "The length of the bridge would be about that of my car;" and, as already pointed out, the length of the bridge was shewn to be about 13 feet. That the shorter the vehicle, of ordinary construction, the more readily is it turned in a given space, does not need demonstration.

While there is evidence of persons who say they found difficulty in making the turn in the usual way—and some say it was impossible—there is, on the other hand, the uncontradicted evidence of many others as to actual happenings and actual use extending over several years, indicating positively that there was nothing to suggest, so far as the experience from such use is any guide, danger to traffic such as passed or reasonably could be expected to pass that way. It is not shewn that any complaint was made or objection raised that the bridge or its approaches were unsuitable for the traffic which passed over them, except on one occasion, to which I shall presently refer.

There is the positive evidence, on the other hand, of persons most likely to have heard of such complaint or objection—had there been any—that none such were made. There is likewise evidence that none of these persons knew or heard of any accident having happened in all these years, except in one instance—several years ago—when an automobile struck against the railing of the bridge; but on the evidence this was not necessarily attributable to the condition of the bridge. One witness, however, says that he knew of the projecting part of the frame-work of a sleigh having struck the side of the bridge, but the cause of this is not assigned.

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Dr. McCallum, who says this bridge is on the road to Iperwash Beach, where he had his summer home for 12 years, says also that he has travelled over it hundreds of times, "may be two hundred or more. I have gone over this bridge more than 4 times a week for 6 weeks every summer." He "counts" it dangerous from the standpoint of going down that hill," and says that whether there is "room to turn around properly will depend a great deal on the length of the car and the skill of the driver." He speaks of an occasion there or four years ago when, as president of the Iperwash Beach Association, members of the municipal council met him on his invitation and "talked of all the roads," he being anxious, as he puts it, to make the road good; but he does not tell us in what respect that road was not good or if the condition of the bridge was then in question. Again he says: "Mr. Spearman" (who he thinks was then the Reeve) "came down, and I think two Councillors with him. We spent the afternoon going over the road, and I pointed out the necessity for the Iperwash Beachers to have a good and a safe road. After we had gone over the bridge and were back into the road again, the whole road-situation was gone over."

"Q. Was anything said about the bridge? A. Yes, I pointed out the bridge was not safe. But it was merely incidental, the emphasis was on the other end" (of the road).

It is manifest that the bridge was not a matter of serious complaint on his part; his reference to it was, as he says, merely incidental.

The value of this witness's evidence can be estimated from the contradiction of his statements, in more respects than one, by other witnesses both for the plaintiff and defendants, as, for instance, when he speaks of the distance from the bridge to the foot of the hill (already referred to) as 30 or 40 feet.

The duty imposed by the Municipal Act upon municipalities in respect to keeping highways in repair is imperative and requires them to make the roads reasonably safe for the purposes of travel; and, motor-vehicles being now an ordinary means of transportation, this would include travel by such vehicles: *Davis v. Township of Usborne*, 36 O.L.R. 148, 28 D.L.R. 397.

In *Foley v. Township of East Flamborough* (1898), 29 O.R. 139, a judgment of a Divisional Court, Armour, C.J., in defining what is

meant by "repair," said (p. 141): "I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied." This judgment of the Divisional Court was reversed by the Court of Appeal (*S.C.* (1899), 26 A.R. 43), but on altogether different grounds, the Court not dissenting from this opinion of the Divisional Court, which is in harmony with other decisions, and may properly be applied here.

The duty so resting upon municipalities must not be treated lightly or minimised, and municipal councils should not be encouraged into the belief that the requirements of the Act need not be strictly fulfilled; but occurrences such as that involved in this case should be considered and their cause determined according to the circumstances and conditions in which they happen. I am not to be understood as holding that any other bridge and its approaches constructed as these existed at the time of the plaintiff's accident necessarily evidence compliance with the statutory duty of the municipality having jurisdiction over it. We are dealing here only with this particular occurrence, on the evidence and in the conditions which that evidence reveals, and it is only necessary that I should express an opinion on the facts of this case.

Returning to the evidence of the user of the bridge and road, it is not reasonable to accept as conclusive the statements of those who say that they found it difficult—nay impossible—to make the turn in the usual manner, and that they could only make it by stopping, reversing the motion of the car, and then making a fresh start more directly along the line of the roadway across the bridge, as against the evidence of many who either actually travelled over the bridge with motor-cars or spoke with intimate knowledge of the locality and of the large amount of traffic of all kinds (including motor-cars of all sizes) regularly passing that way, and who deny that at any time there was even a suggestion that the bridge and its approaches were objectionable or a source of danger from the standpoint of the conditions to which the plaintiff attributes his accident.

I much prefer the uncontradicted evidence of those who actually did the act or saw it done, without any thought or suggestion of anything out of the ordinary, to that of those who

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say it cannot be done; and, if further proof of the character of this bridge were necessary, there is the evidence afforded by the plan, exhibit 3, of the radius of the circle made by the turn from the roadway on to the bridge, the photographic view sworn to as correct by the person who made it, and the statement of Mr. McCubbin, experienced I assume in such matters, that this place presents "the ordinary conditions you will find at the crossing of two roads in a rectangular system of surveys"—a statement which I cannot find has been either contradicted or discredited.

Taking this with Keene's evidence as follows:—

"His Lordship: Could you turn in a 66 feet road? A. I could not turn in this room.

"Mr. Weir: To turn off one road on to another at right angles, what turn do you have to make? A. The average corner.

"Q. You could turn anywhere on the average corner? A. Yes.

"Q. Keeping to the centre of the road? A. Keeping to the centre of the road."—I find it impossible to harmonise with this evidence the other statements of this witness that it was impossible for him to make the turn on to this bridge in the usual manner. This witness also says that with his car (the one in question) in turning at a right angle he would require to follow a curve with a radius of 35 feet.

"Q. I do not mean turning to face in the opposite direction, I mean merely to take a right angle. Can you tell me in what radius you would do that? A. I would have to have 35 feet."

It is questionable if the municipality could reasonably have expected that on this highway vehicles requiring such space upon which to make a right angle turn would have to be provided for.

It must be apparent that traffic on the ordinary streets and highways, with many vehicles now in every day use, would be impossible for practical purposes if, as some of the plaintiff's witnesses say, motor-cars such as are here spoken of could not in the space afforded at this bridge make the turn unless by the unusual method sworn to by some of these witnesses.

The learned trial Judge expressly accepts the evidence of Mr. Flock as to the moderate and due care with which the car was driven when approaching the bridge. He also expressly credits the evidence of Mr. Coleridge, who drove over this road several times in the summer of 1917, and who says, "we" could never go

around the turn without stopping; "we" always stopped, turned back, and then went over the bridge. He was not the driver of the car in which he rode, and could not say, and did not know, if the driver was experienced or not.

That evidence is of little assistance, for from all that appears from it the difficulty he says his driver experienced is as readily attributable to his inexperience or incompetency as a driver, as to the condition of the bridge or the road.

With great respect, I am of opinion that the learned trial Judge overlooked the inconsistencies in some of the evidence put forward for the plaintiff, such as that of Keene, and the effect of the uncontradicted evidence of the actual and continued use of this part of the highway by all kinds of vehicles, some of which, however, witnesses for the plaintiff in effect say was impossible, as well as the evidence of McCubbin that this point presents the ordinary conditions found at a crossing of two roads in a rectangular system of surveys.

After a careful analysis of the whole evidence, I am convinced that the predicament in which the plaintiff and his companions found themselves on the 26th July, 1917, must be attributed to some cause other than the width of the bridge, the curve from the roadway leading on to it, or the presence of the piles or logs on the right of way.

The appeal should, in my opinion, be allowed with costs, and the action dismissed with costs.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed with KELLY, J.

RIDDELL, J., agreed in the result.

CLUTE, J. (dissenting):—Appeal from the judgment of Meredith, C.J.C.P., delivered the 7th August, 1918. Action tried at Sarnia on the 29th and 30th April, 1918, without a jury.

This action is brought by the plaintiff for injuries received on the 26th July, 1917, while the plaintiff was riding in a motor-car upon a highway within the defendants' municipality.

The plaintiff, with three others in the car, which was driven by one Arthur H. Keene, with whom the plaintiff was a passenger, was going north, and at a point where the road turns to the west and

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crosses a bridge, the accident occurred. In making the turn, the driver Keene found that he could not clear the north railing of the bridge, but that, if he continued on, the right wheel would be north of the northern part of the bridge, and would cause, as he says, the car to upset. Thereupon, he turned the car to the right, knocking off a portion of the railing, and, putting on the emergency brakes, ran a few feet partly over the bank, and succeeded in stopping the car before it plunged into the creek. The plaintiff was seriously injured, and brings this action for damages, alleging: (1) want of repair of the approach to the bridge; (2) that the bridge was too narrow and crossed the creek at a sharp and dangerous angle; (3) that a view of the bridge was obstructed by underbrush and weeds which had been allowed to grow upon the approach thereto; (4) because of the sharpness of the turn necessary to cross the bridge; (5) because of the obstruction of the highway by a number of piles or logs placed thereon by the defendants some time previously, and allowed to remain there.

The defendants deny that the bridge or highway was out of repair, and assert that the same was in excellent condition and properly constructed, and that the bridge was of good width and amply sufficient for the safe passage of motor-cars and other vehicles, and further allege that the accident was caused by the excessive rate of speed of the motor-car in which the plaintiff was travelling and by the neglect of the plaintiff and driver.

The road had formerly passed north on the east side of the creek or ditch, as it is called. This creek ran along the highway, and at the point in question was wholly upon the highway, which was 66 feet wide, leaving 5 or 6 feet of the highway to the west of the ditch. To the north of the bridge in question, the water "had eaten" into the east bank, and the council purchased land immediately to the west of the road allowance, and constructed a road thereon on the west side of the creek, in lieu of the road which formerly passed to the north on the east side of the creek. The road upon the east side just north of the bridge was closed; a bridge which had been constructed across the ditch to enable the owner of the land at that point to reach the highway was utilised for the purpose of the highway. It was 13 feet 1 inch wide and about 12 feet in length across the stream. It was built wholly upon the original allowance for road, running north and south,

leaving 7 or 8 feet between the west end of the bridge and the west side of the original road allowance, running north and south.

The plan (exhibit 1) shows the stream or ditch from bank to bank below the bridge, 20 feet, turning into the bridge, which is 12 feet wide. The travelled part of the roadway is 12 feet; it is about 500 feet from the bridge to the top of the hill, the slope of which towards the bridge is 300 feet, and the balance of 200 feet is nearly a level, with a rise of about 18 inches as it approaches the bridge.

As the trial Judge points out (43 O.L.R. at p. 436), it is the character of the cross-over, which the defendants compel the traffic to make, that the plaintiff finds fault with: his contention is, that the turn which must be made, going north, at the bridge, is too sharp, having regard especially to the narrowness of the bridge, and that the bridge is altogether too narrow; that, instead of keeping the road in repair, the defendants have needlessly made it dangerous, really creating a public nuisance. The learned trial Judge finds that "it is a very serious objection, and obstruction to traffic, when made part of a much travelled highway." He further finds (p. 437) that it is made plain by the defendants' recent conduct, respecting the bridge, that they considered it insufficient; when the accident happened, they were about to widen it, and had building material for that purpose on the ground. He reaches the conclusion (p. 437) that the defendants had been guilty of neglect of the duty imposed upon them by statute, to keep in repair the highway in question at the place where the accident happened. After examining the evidence given by the defendants' witnesses, he considers it "quite insufficient to counterbalance the testimony to the contrary, the admitted facts as to the width of the bridge, the nature of the approach to it, and the defendants' intention immediately to widen it, combined."

After a careful reading of the evidence, I agree with the conclusion arrived at by the trial Judge and with the reasons for that conclusion.

The witnesses who were questioned upon the point expressed the view that it was easier to make the turn in question when leaving the bridge and turning south than it was in going north, as was the case when the accident occurred. This, I think, is obvious: in the

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one case you are limited to the width of the bridge, 13 feet, to make the entry upon the bridge; in the other, passing from the bridge, you have the available width of the road.

It will be observed, as before indicated, that the turn has to be made within that portion of the 66 feet east of the bridge. The evidence establishes that it has been made by many motors of different sizes; it depends at what point and how the turn is made. No doubt the bridge is visible after the crest of the hill is passed, but to one not familiar with the road the width of the bridge would not be known, and this, I think, is very material. A skilful driver with a knowledge of the condition might make the turn. In the case of one who did not have a knowledge of the nature of the turn and the width of the bridge, if he delayed a second at the proper point where the turn should commence, it would be too late to make the curve to clear the north rail of the bridge, and an accident would be invited. At 10 miles an hour, less than 3 seconds would bring him to the bridge, and a moment's delay in making the turn might be fatal.

It was proven that this was a much travelled road, scores of motors sometimes passing in a day without accident, and this is urged as an answer to the plaintiff's claim. A careful reading of the evidence, however, does not lead me to this conclusion. Dr. McCallum, a physician of London, has occasion in going to his cottage at the beach to use this road very frequently in the summer, sometimes 5 times a week. In his evidence he says: "I count it a dangerous bridge from the standpoint of going down that hill; when I take a guest to my summer home, I generally stop on the hill, and if he is in a car behind I go back and instruct him how to turn and tell him it is a dangerous bridge. My own way in approaching the bridge is to come almost to a standstill and pass Dent's gate and go in that way. I have stood and stopped at the bridge before I attempt to go across it. . . I pass out as far as I can go until I come opposite, then I go across that way, if I fail to stop. That gives me time to stop. I go as near to the gate as I can (that is, the gate opposite the bridge). I have gone as near to the gate as I could, or the fence rather. I drive a Ford car. . . . It is 8 years at least, I think, since J. McNaughton and Mr. Murphy and I rode down that hill and tore the side of the bridge off." He notified the council that the bridge was not safe.

Mr. Murphy, referred to by the last witness, states that he only tried the bridge once on the day of the accident, at other times he would not take the risk; he would back up and then make the turn as he did some half a dozen times.

Mr. George A. McCubbin, civil engineer, called by the defence, says that keeping in from the outside the radius is 30 feet, and that the curvature would be just about the same curvature on a travelled portion of the two roads where they make a right angled turn there one to the other. The fallacy in this evidence is, I think, that, while the curvature may be the same, the conditions are different. Here you have to make the entry on a 13-foot bridge, and if you are wrong in your calculations as to the exact point to make the turn, or the driver for a moment delays to act, the beginning curvature would have been carried too far forward to make the entry on the bridge safely. No doubt persons accustomed to drive motor-cars may become great adepts and be able to gauge with the eye almost instantly the point where the curve should commence, but that skill and perfection ought not to be called for on a highway; it ought to be safe for a person possessing reasonable skill and exercising reasonable care.

A Mr. Duffus, called by the defence, who lives near the place of the accident, says that he has seen the wide parts of sleighs knock that railing, and he had fixed it up when he was pathmaster, but had not heard of an automobile hitting it.

Mr. Coleridge, a barrister of London, who impressed the Judge with "the feeling that much dependence might be placed upon all that he said" (p. 438), stated that he had a cottage at Iperwash Beach, and that during the summer of 1917 he passed quite frequently over this bridge; he was not the driver; they used a McLaughlin car. "We could never get round that turn without stopping, that is all I can say, that was the practice, we always stopped, turned back, backed up, and then went over the bridge. This occurred from June to the end of August; that was the way we got across, and even then we scratched the rails."

Giving due weight to the whole of the evidence, and having regard to the amount of travel, I think there is quite sufficient evidence to support the findings of the trial Judge, and that the evidence established that the road is not reasonably safe, and that its defective condition was the proximate cause of the accident.

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All the witnesses who are questioned upon the point agree that it was quite practicable to make the turn on an obtuse angle at an additional cost of from \$75 to \$100, or if the bridge was widened as proposed before the accident by 8 feet it would be sufficient to make an easy and safe approach.

Having regard to the travel and the financial condition of the township and its duty in that regard, there is, in my opinion, no excuse for the road being left in the condition it now is as a menace and danger to the public. There was little or no dispute as to the reasonableness of the amount of the damages found.

I think the findings of the trial Judge in all respects are right, and the appeal should be dismissed with costs.

Appeal allowed (CLUTE, J., dissenting).

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Jan. 13.

[APPELLATE DIVISION.]

CAMPBELL v. MAHLER.

Contract—Formation—Sale of Goods—Agents' Bought and Sold Notes—"Terms Usual"—Breach of Contract—Damages—Judgment for Small Amount—Appeal.

The judgment of FALCONBRIDGE, C.J.K.B., 43 O.L.R. 395, was affirmed. The Court will not refuse to entertain an appeal by reason of the smallness of the amount in question.

APPEAL by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 43 O.L.R. 395.

January 13. The appeal was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

R. G. Fisher, for the appellants, argued that they refused the contract in their letter of the 20th October, 1914. The words "terms usual" meant payment as soon as the apples should be packed.

G. S. Gibbons, for the plaintiffs, respondents, contended that the terms of the contract were clear to any one who wanted to understand them; that the contract was complete on the delivery to the respondents of the bought note; that the appellants sought to incorporate a new term into the contract, namely, that the

goods should be paid for immediately; and that the appellants had failed to prove that "terms usual" meant immediate cash payment.

Fisher, in reply.

At the conclusion of the hearing, the judgment of the Court was delivered by RIDDELL, J.:—In the fall of 1914, commission agents at Calgary, who had been acting for the defendants, apple-dryers in Ontario, telegraphed the defendants that they had sold for them to the plaintiffs a certain number of car-loads of dried apples, c.o.d., at a price named—delivery on the opening of navigation.

This was accepted by the defendants; and the agents delivered bought and sold notes stating the amount, quality, and price, delivery on the opening of navigation, 1915, "terms usual."

The defendants objected to the sold note, on the ground that "delivery on the opening of navigation" was stated therein; but offered to carry out the contract if the plaintiffs would pay for the apples as soon as boxed. This the plaintiffs refused to do, claiming that payment was to be on the delivery of the apples on board cars.

The defendants refused to supply the apples, and the plaintiffs sued for damages, obtaining a verdict for \$5 and County Court costs without a set-off.

We think that the defendants cannot succeed in their appeal.

The contract was complete on the delivery to the plaintiffs of the bought note—the bought note contained the defendants' contract, the usual terms being implied.

On the evidence, the usual terms of payment were payment on delivery of the apples f.o.b.—and the defendants were not entitled to demand payment before delivery.

The Court will not refuse to entertain an appeal by reason of the smallness of the amount in question.

Appeal dismissed with costs.

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[IN CHAMBERS.]

Jan. 15.

RE S.

Infant—Illegitimate Child—Inability of Mother to Maintain—Custody—Order of Commissioner of Juvenile Court—Jurisdiction—"Neglected Child"—Committal to Care of Children's Aid Society—Juvenile Delinquents Act, 7 & 8 Edw. VII. ch. 40 (Dom.)—Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, secs. 2 (1) (h), 9, 28—Children's Protection Amendment Act, 1916, 6 Geo. V. ch. 53, secs. 3 (4b), 4 (2)—Notice to Person Having Actual Custody of Child—Irregularities in Procedure—Motion to Quash Order—"Anglican"—"Protestant"—Discretion—Welfare of Child.

"An illegitimate child whose mother is unable to maintain it" is declared, by sec. 2 (1) (h) of the Children's Protection Act of Ontario, to be a "neglected child" within the meaning of that Act:—

Held, that A. S., an illegitimate child of Mary S., who was unable to maintain him, was a "neglected child" to whom the Act applied, although he was not in fact neglected, having been adopted by persons who fully and faithfully cared and provided for him.

Under the combined effect of the Juvenile Delinquents Act, 7 & 8 Edw. VII. ch. 40 (Dom.), and the Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, the Commissioner of the Juvenile Court, Toronto—the boy being found in Toronto—had jurisdiction to investigate and to declare that the boy was a neglected child and a Protestant, and to order that he should be made a ward of the Children's Aid Society of Toronto.

The statute does not void proceedings resulting in an adjudication so long as the Commissioner is satisfied that the parents or the person having the actual custody of the child have been notified of the investigation before he proceeds to dispose of the matter: Children's Protection Amendment Act, 1916, 6 Geo. V. ch. 53, sec. 3 (4b).

Trifling irregularities in the procedure in the Juvenile Court, none of them affecting the merits, were not considered in determining whether the order of the Commissioner should be quashed.

By sec. 4 (2) of the Act of 1916, the illegitimate child of a Protestant mother shall be deemed to be a Protestant; and the Commissioner did what the law required in making the boy a ward of the aforesaid society: secs. 9 and 28 of the principal Act.

A distinction is made in the statute between "Roman Catholic" and "Protestant;" "Protestant" must be taken to include "Anglican."

The plain directions of the statute must be followed—the Court had no discretion to exercise in regard to the custody of the child.

APPLICATION by Ellen McD., as the person having the actual custody at the time a certain order was made, of the person of A. S., a boy whom she had adopted, to quash the order, which was made by the Commissioner of the Juvenile Court, Toronto, finding that the boy was a "neglected child" and a Protestant, and directing that he should be made a ward of the Children's Aid Society of Toronto.

January 14. The motion was heard by RIDDELL, J., in Chambers.

Frank J. Hughes, for the applicant.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

January 15. RIDDELL, J.:—Mary Helen S., when a child of about 15 years of age, met Thomas Henry S., of Stirling, where she lived with her father and mother; she left home and went with him to Peterborough, where they lived as man and wife; then they came to Toronto, where seven children were born to them, the youngest being the lad A. S., concerning whom the present application is made. Two of the seven died, and, when A. S. was in long clothes, the father deserted the woman and her children; she put four of the children into the Sacred Heart Orphanage, and, after a fruitless effort to place A. S. in the Infants' Home in St. Mary street, Toronto, she placed him in the St. Vincent's Infants' Home, agreeing to pay \$2 per week for his support. She found the father in Oshawa in 1908, and they were married—before going to meet him she inquired about A. S. and was told at the Infants' Home that he was dead. Another child had been put out on a farm, but the other three, all boys, she took with her to Oshawa, where she lived with her husband till two or three years ago, when the husband deserted her and she has never seen him since. A legitimate child was born to her after this desertion.

The husband had been an Anglican, but had become a Roman Catholic; the wife was an Anglican, but when living with her three boys attended the Roman Catholic church; the three boys went to the Roman Catholic Separate School in Oshawa—two of them were placed in the Sunnyside Orphanage, the third was placed in Blantyre. He grew up and gave his life for his country in the trenches in November, 1917. The mother has lost track of the other two.

D. J. McD., a storekeeper of Allandale, and his wife, having no children, took A. S., and, as the wife says, "adopted this boy in the expectation that he would be left with us." When and how they got the boy does not anywhere appear, but it was from the Sunnyside Orphanage. In 1917 he became disobedient and unmanageable; and in the spring of 1918 Mrs. McD. returned him to the Sunnyside Orphanage. Shortly afterwards, on the 14th May, she took him out with the consent of the orphanage authorities. In a fortnight she returned him again; she says that she never at any time intended to give up control of this boy, but wanted him to "learn a lesson"; on the 19th September she took him away again.

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In the meantime proceedings were being taken in the Juvenile Court, Toronto. A complaint was laid on the 3rd July, 1918, that A. S., residing at the Sacred Heart Orphanage, was "a neglected child in that he is deserted by his parents." Evidence was taken of the officers of the orphanage and of the St. Vincent de Paul Children's Aid Society, and the case was adjourned for further evidence.

The mother was found residing near Oshawa, keeping house for a farmer and market-gardener; she works for the board of herself and her legitimate daughter, without other remuneration, and is wholly unable to support her son A. S. She had never heard of A. S. since 1908 and thought him dead.

She was brought to the orphanage in September and identified her child without trouble. Her evidence having been taken, in which she swore that she was a Protestant and desired him to be brought up as a Protestant, the child was ordered to be produced in Court; he was brought in on the 10th December, and the Commissioner held that he was a neglected child and a Protestant; and he ordered that he should be made a ward of the Children's Aid Society of Toronto.

The present application is made on behalf of "Ellen McD., the person having the actual custody at the time of making the order;" she asks that the order be quashed, on the ground that A. S. was not and is not a neglected child, and on grounds of irregularities in the proceedings.

Were the ordinary meaning to be given to the words "neglected child," there could be no pretence that A. S. came within the category—the McDs. seem to be perfectly respectable and reliable people, both able and willing to care for the lad, and he could not be called neglected in the ordinary sense of the term. But the Legislature, in determining the various classes of children concerning which special provisions should be made, selected the classes and used the term "neglected children" to cover them all. There is no significance in the words "neglected children"—they are no more than an algebraical symbol used for convenience to indicate all whom the legislation is intended to affect.

Many Judges have complained of this method of legislating: e.g., Lord Esher complained that a section of an Act said that a "boiler" should mean something not a boiler at all—but the

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Court was obliged to hold that a steam-pipe which conducted steam from the boiler above ground to a pumping engine below in a mine was a boiler, though it was in reality not a boiler: *Regina v. Commissioners under the Boiler Explosions Act 1882*, [1891] 1 Q.B. 703 (C.A.) Lord Esher (then Lord Justice Brett) objected to "Parliament insisting upon saying that things are what they are not:" *Bradley v. Baylis* (1881), 8 Q.B.D. 210, at p. 230; but could not avoid the expressed will of Parliament. So I cannot get over the plain words of the statute, even although it may say that things are what they are not; and, when the Legislature says, in the Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, sec. 2 (1) (h), that "an illegitimate child whose mother is unable to maintain it" is a "neglected" child, I must hold that it is a neglected child, even although I know it is not neglected but fully and faithfully cared and provided for.

A. S. is "a child . . . an illegitimate child whose mother is unable to maintain it:" and therefore is a neglected child within the meaning of the Act—a neglected child to which the Act applies.

Under the combined effect of Dominion and Provincial legislation Mr. Boyd (the Commissioner of the Juvenile Court) has jurisdiction in the premises: Juvenile Delinquents Act, 7 & 8 Edw. VII. ch.40 (Dom.); Children's Protection Act of Ontario, R.S.O. 1914, ch. 231.

Then, by sec. 9 (1) of the Ontario Act, any "neglected child" may be taken by an officer; and the Judge (including a Commissioner, under sec. 2 (1) (e)) "shall investigate the facts of the case and ascertain whether the child is a neglected child and its age, and the name, residence and religion of its parents:" sec. 9 (2).

It may well be that it would have been more regular to notify the McDs. earlier and allow them an opportunity to hear and test all the evidence, but the statute does not void proceedings resulting in an adjudication so long as the Judge is satisfied that the parents or the person having the actual custody of the child have been notified of the investigation before he proceeds to dispose of the matter: Children's Protection Amendment Act, 1916, 6 Geo. V. ch. 53, sec. 3 (4b). And that was done in the present instance: Mrs. S. was notified in September, and gave evidence

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on the 12th September; the McDs. knew in November, and the adjudication took place in December. Moreover, the Orphanage and its officers, who were in the actual custody of the child when the proceedings began and for some time afterwards, were party to the proceedings and cognisant of them throughout.

There are some trifling irregularities; none of them at all affects the merits, none is made fatal by statute, there are no decisions to which I must bow, and I shall not be the first to hold this semi-paternal Court to strict practice or to interfere on technical grounds, when everything has been fair and open and no harm done by technical defects.

By statute this is a Protestant child; by (1916) 6 Geo. V. ch. 53, sec. 4 (2), "the illegitimate child of a Protestant mother shall be deemed to be a Protestant"—and "no Protestant child shall be committed to the care of a Roman Catholic . . . institution." R.S.O. 1914, ch. 231, sec. 28 (1).

It is true that the mother does not say that she is a Protestant in so many words; but I take judicial cognisance that an "Anglican" is of the Church of England—and the Church of England is by many statutes recognised as Protestant. The Court has no concern with theological conceptions of any kind and does not deal with them—in the present statute the distinction is between Roman Catholic and Protestant; the Church of England is Protestant—consequently by statute A. S. is Protestant.

The Commissioner was forbidden by law to commit the boy to a Roman Catholic institution or individual: R.S.O. 1914, ch. 231, sec. 28 (1); and he did what the law requires in making him a ward of the Children's Aid Society: R.S.O. 1914, ch. 231, sec. 9 (5).

All questions of discretion on the part of the Court or of the effect of the wishes of parents are excluded in the present case—the Legislature has made the whole statutory—mandatory—so that the Court must follow the plain directions of the statute without regard to the Court's own view of what would be the best for the child. *Dura lex—fortasse—sed lex.*

The motion will be dismissed with costs.

[APPELLATE DIVISION.]

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Jan. 16.

REX v. HYNES.

Criminal Law—Engaging in the Business of Betting or Wagering—Criminal Code, sec. 235 (e) (9 & 10 Edw. VII. ch. 10, sec. 3)—Transactions not Protected as Private Bets—Sec. 235 (2)—Aiding Another to Commit Offence—Sec. 69 (b)—Evidence for Jury—Frequency of Acts.

Section 235 (e) of the Criminal Code (as enacted by 9 & 10 Edw. VII. ch. 10, sec. 3) provides that every one is guilty of an indictable offence who engages in the business of betting or wagering. The evidence shewed that the defendant placed bets for a friend (M.) with G., who was admittedly a book-maker, engaged in the business of betting. The bets made in the six months before prosecution were about a dozen in all. The defendant also made "credit bets" with P., about twice a week, during the 6 months:—*Held*, that, although "engaging in business" does not mean taking part in a single act, but connotes a repetition or series of acts, the evidence was ample to justify a jury in finding that the defendant engaged in betting as a business, and therefore engaged in the business of betting (MASTEN, J., expressing no opinion as to this); and the transactions were not protected by sec. 235 (2).

Held, also, that, as G. was engaged in the prohibited business, there was evidence upon which the jury might find that the defendant did acts for the purpose of aiding G. to commit the offence, and was thus in law guilty of the same offence, by virtue of sec. 69 (b) of the Code.

Per MASTEN, J.:—Mere frequency in the performance of an act will not establish the doing of business in respect of such act.

CASE stated by the Senior Judge of the County Court of the County of York upon the trial of the defendant before the Judge and a jury at the Sessions, and conviction made upon a verdict of guilty.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

This is a case reserved by His Honour Judge Winchester on the following facts:—

Hynes was a hotel-keeper in Toronto. One Maynard, a bank-manager, wanted to place money with Gagen, who carried on business as a book-maker: he did not know Gagen, but Hynes did, and Maynard knew Hynes, and Maynard got Hynes to bet on his behalf on the races with Gagen, Maynard supplying the money and selecting the horse himself. The bets ranged from \$200 to \$500 at a time—one or sometimes more bets per day. When Maynard lost, he paid the money to Hynes; when Maynard won, Gagen drew a cheque to "cash" and gave it to Hynes, who cashed it (sometimes without shewing it to Maynard), and gave the proceeds to Maynard. The bets in all were about a dozen in number within the six months before prosecution.

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There is no evidence that Hynes was paid anything by either Gagen or Maynard, and none to contradict his statement that he acted in this way to oblige his friend Maynard. Although there is something in the evidence of Gagen which might indicate that Hynes was acting for Gagen, it is not enough to establish this as a fact.

There is another class of transactions in which Hynes took part. One Phillips was in the habit of betting with him from \$10 to \$200, about twice a week—credit bets—Phillips paying Hynes in cash or by cheque if he lost, and usually being paid in cash by Hynes if he won. The practice was for Phillips to call up Hynes at his place of business by telephone and tell him he wanted to bet, make the deal over the telephone, and settle the next day—Hynes calling on Phillips for that purpose.

Hynes was tried at the Sessions, before His Honour Judge Winchester and a jury, on a charge that he “did engage in the business of betting or wagering contrary to the Criminal Code.” The jury found a verdict of “guilty.”

The learned Judge (Chairman of the Sessions) reserved a case for the opinion of the Court:—

“Was there any evidence of the offence charged to go to the jury?”

January 13. The case was heard by RIDDELL, LATCHFORD, and MASTEN, JJ., FERGUSON, J.A., and ROSE, J.

James Haverson, K.C., for the defendant, argued that he was not engaged in the business of betting, as that phrase, in sec. 235 (e) of the Criminal Code, should be interpreted. See sec. 235 as enacted by 9 & 10 Edw. VII. ch. 10, sec. 3. The frequency of the bets did not constitute the action of betting a business. The defendant was only the agent of Maynard; and, unless Maynard could be convicted, the defendant could not be convicted. The defendant's acts came within the exception in sec. 235 (2). The defendant was not Gagen's agent, and consequently sec. 69 did not apply so as to make the defendant guilty of aiding Gagen to commit the offence.

Edward Bayly, K.C., for the Crown, contended that the defendant by his acts brought himself under the provisions of sec. 69. Gagen admitted being a book-maker. The defendant

collected money which aided Gagen in carrying on his business. As to the defendant carrying on the business of betting, not only the frequency of the wagers must be considered, but the manner of making them, and the surrounding circumstances also, and these were sufficient to bring the offence home to the defendant. Counsel referred to *Fairburn v. Evans*, [1916] 1 K.B. 218.

Haverson, in reply.

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January 16. RIDDELL, J. (after setting out the facts as above):—The indictment is under sec. 235 (e) of the Code: "Every one is guilty of an indictable offence . . . who . . . engages in the business . . . of betting or wagering. . . ." (See sec. 235 as enacted in 9 & 10 Edw. VII. ch. 10, sec. 3.)

Engaging in business does not mean taking part in a single act; it connotes a repetition or series of acts; but where a person makes bets averaging two a week for a period of at least six months, in the manner and under the circumstances disclosed here, there is, in my view, ample to justify a jury in finding that he engaged in betting as a business, and therefore engaged in the business of betting. That being so, the transactions are not protected by sec. 235 (2), which exempts from penalty "a private bet between individuals not engaged in any way in a business of betting." Quite irrespective of the Maynard transactions, the question should be answered in the affirmative.

In the Maynard cases it is contended by the Crown that, as Gagen was clearly engaged in the prohibited business, Hynes was also in law guilty of the same offence under the provisions of sec. 69 (b) of the Code, in that he did acts for the purpose of aiding Gagen to commit the offence; that his acts of carrying bets to Gagen did aid Gagen to commit the offence, and the purpose was for the jury to decide. While the mere carrying of a bet or two to a book-maker for a friend to oblige him and enable him to keep under cover might not be satisfactory evidence of the forbidden purpose, I think there is enough in the present case to justify a jury in so finding. The sole question before us should be answered in the affirmative.

LATCHFORD, J., FERGUSON, J.A., and ROSE, J., agreed with RIDDELL, J.

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MASTEN, J.:—The prisoner, John F. Hynes, was tried before His Honour Judge Winchester with a jury, for that he (the prisoner) "within six months ending on the 27th day of April, 1918, at the city of Toronto, unlawfully did engage on the offence of betting or wagering contrary to the Criminal Code," and was found guilty by the jury.

There is submitted to us the sole question, "Was there any evidence of the offence charged to go to the jury?" and I agree with the other members of the Court that our answer must be in the affirmative.

Section 235 of the Criminal Code provides that "every one is guilty of an indictable offence . . . who (e) engages in pool-selling or book-making, or in the business or occupation of betting or wagering;" and sec. 69 provides: "Every one is a party to and guilty of an offence who,—(a) actually commits it; or (b) does or omits an act for the purpose of aiding any person to commit the offence; or (c) abets any person in commission of the offence."

There was, in my opinion, evidence from which the jury were entitled to infer that what the prisoner did was done for the purpose of aiding one Gagen to commit an offence under sec. 235. Gagen was admittedly a book-maker and engaged in the business or occupation of betting or wagering.

I express no opinion, however, as to whether there was any evidence to warrant a finding that Hynes actually and personally committed the offence of engaging in the business of betting or wagering, and desire to reserve, until the question hereafter arises, a consideration of the proper interpretation of that clause of the Criminal Code.

I dissent from the view expressed by the trial Judge in his charge that mere frequency in the performance of an act will establish the doing of business in respect of such act. Because a man bathes every day, it does not follow that he is engaged in the business of washing, or because a golfer on two or three days in every week bets a ball on the game when he plays with a friend, it does not follow that he is engaged in the business of betting: mere frequency of performance does not constitute engaging in business, though it is undoubtedly relevant as evidence, and capable, when adequately supported by other surrounding circumstances, of establishing engagement in a business.

- [LENNOX, J.]

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Jan. 21.

YEOMANS v. KNIGHT.

Contract—Agreement to Remunerate Plaintiff for Use of Political Influence with Servants of Crown to Obtain Benefit for Defendants—Action upon Agreement—Summary Dismissal as Contrary to Public Policy—Costs.

An action to recover a commission for procuring for the defendants contracts from the Crown was summarily dismissed, upon it appearing, by the admissions of the plaintiff upon his examination for discovery, that the commission was claimed under an agreement by which the plaintiff was to use his political influence with servants of the Crown to obtain the contracts, which was an agreement contrary to public policy.

Montefiore v. Mendenay Motor Components Co. Limited, [1918] 2 K.B. 241, followed.

The action was dismissed with costs, the plaintiff having been paid a part of the commission, which he did not legally earn.

THIS action was brought by Robert M. Yeomans, plaintiff, against W. H. Knight, F. J. Schuch, Donald A. Cameron, and Thomas A. Chisholm, carrying on business as the Knight Metal Products Company, defendants.

The plaintiff by his statement of claim alleged that the defendant Knight was anxious to obtain a contract from the Shell Committee, and agreed to pay the plaintiff and one Bertram Macdonald a commission of 2 per cent. on all contracts for munitions from the Shell Committee or their successors; that on the 29th April, 1918, the plaintiff obtained an assignment of all the interest of the said Macdonald in the said commission; that the plaintiff then went to the city of Ottawa and obtained a contract for the defendant Knight, and the defendant Knight arranged that the contracts should be taken by the Ontario Metal Products Company Limited; that the defendant Knight then applied to the defendant Chisholm for financial assistance to carry out the said contract, and the defendant Chisholm referred the matter to the defendant Cameron, who stated that the Canadian Bank of Commerce would be unwilling to advance money to the Ontario Metal Products Company Limited, but would advance money to the defendant Knight; that the defendants Knight, Cameron, and Chisholm then formed a partnership for carrying out the said contracts and duly paid the plaintiff a part of the said commission; that the defendants Knight, Cameron, and Chisholm then obtained further contracts from the Imperial Munitions Board, successors to the Shell Committee, and had made large profits thereon.

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which had been duly divided amongst the said Knight, Cameron, and Chisholm; that the plaintiff then applied to the defendants for an accounting of the moneys received in connection with the said contracts and for the commission payable to him, but the defendants neglected and refused to pay the said commission or any part thereof.

The plaintiff claimed a declaration that he was entitled to 2 per cent. commission on all contracts obtained by the Ontario Metal Products Company Limited, the Knight Metal Products Company, W. H. Knight, Donald A. Cameron, and Thomas A. Chisholm; an accounting; an order directing the defendants to pay the plaintiff 2 per cent. commission on all moneys received from the said contract; the plaintiff's costs of the action; and such further and other relief as the nature of the case might require.

The defendants filed statements of defence, and the plaintiff was examined for discovery.

The defendants made motions for judgment dismissing the action, upon the pleadings and admissions of the plaintiff in his examination for discovery.

January 20. The motions were heard by LENNOX, J., in the Weekly Court, Toronto.

Glyn Osler, for the defendants Knight, Cameron, and Chisholm.

L. Davis, for the defendant Schuch.

M. L. Gordon, for the plaintiff.

January 21. LENNOX, J.:—The motion of the defendants, other than the defendant Schuch, is for judgment dismissing the action as against these defendants, upon the pleadings and admissions of the plaintiff upon his examination for discovery herein, upon the ground that the agreement alleged as disclosed by the examination was an agreement by the plaintiff, for valuable consideration, to use his political influence with the Minister of Militia and other members of the King's Privy Council for Canada and members of the Shell Committee, being servants of the Crown, to obtain a benefit for the defendants, and that such contracts and the consideration therefor was and is contrary to public policy, illegal, and void.

The motion of the defendant Schuch is substantially upon the ground above set out, and on the additional ground that the statement of claim discloses no cause of action against him.

The admissions of the plaintiff clearly establish that the remuneration that he and one Bertram Macdonald—whose share he claims to be entitled to by assignment—were to receive, and which he claims in this action, was to be paid in consideration of political influence which the plaintiff was supposed to possess, agreed to exert, and asserts that he successfully exerted, in obtaining a contract from the servants of the Crown, above referred to, for the defendants or some of them.

It is argued for the plaintiff that the rate of remuneration was not fixed until after the Government contract had been awarded; but that does not matter at all, for from the beginning it was understood and agreed that a percentage would be paid, and the rate was to be determined upon a fair basis—according to results, as you might say, and making it a little worse if anything from the plaintiff's standpoint: a stronger incentive to the exertion of ill-directed zeal.

Nor does the disclaimer of one of the servants of the Crown that he had knowledge or recollection of the plaintiff, nor the statement of another to the effect that the intervention of the plaintiff had no effect, in any way affect the question. The point is not a question of the effect, but that what the plaintiff bargained to do was basically vicious in principle; and, whatever may be the result in the particular instance, that it is a contract of a character intended and calculated to prejudice honest and efficient public service.

I was urged by counsel for the plaintiff to allow the action to go to trial in order, amongst other things, that the defendants might have an opportunity—when the whole transaction is fully ventilated—of recovering from the plaintiff the \$1,500 they have already paid him. I hardly think Mr. Gordon is really anxious for this result, but I am not greatly concerned about parties *in pari delicto*, and at all events my paramount duty is to follow as nearly as I can the principles and procedure declared by decided cases: and this is, to stop the case as soon as it is disclosed that the contract is contrary to public policy.

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It was said in *Richardson v. Mellish* (1824), 2 Bing. 229, 252, that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you." There may at times be difficulty in determining whether a specific transaction is or is not contrary to public policy. There is no difficulty in this case: our Government has solemnly declared that patronage is at an end.

The whole question is covered and the authorities reviewed in *Montefiore v. Munday Motor Components Co. Limited*, [1918] 2 K.B. 241, where it is declared that it is contrary to public policy that a person should be hired for money or valuable consideration to use his position and influence to procure a benefit from the Government, and a contract for that purpose is therefore illegal and void; and that, where it appears from the evidence during the hearing of a case that the contract sued on is contrary to public policy, it is the duty of the Judge to refuse to proceed with the trial. This was the position recently taken by the Chief Justice of the King's Bench in a case in this Court of *Garfunkel v. Hunter* not reported, following the *Montefiore* case. The action was accordingly dismissed.

The plaintiff here attempts to qualify his statements on examination by an affidavit subsequently made. There is no escape from the explicit statements of his *vivâ voce* examination. It is vastly more reliable than his afterthought. It is not a case for indulgence, and in any case an amendment would be useless, for the common ground taken by all the defendants goes to the root of the action.

The Chief Justice of the King's Bench dismissed the *Garfunkel* action without costs, as both parties were wrongdoers. Different considerations are presented in this action. The plaintiff has been paid \$1,500, which he did not legally earn. He can well afford to pay costs.

There will be judgment for the defendants on both motions, dismissing the action as against them respectively with costs.

[APPELLATE DIVISION.]

BAILEY V. BAILEY

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Jan. 23.
Mar. 20.

Husband and Wife—Alimony—Wife Leaving Husband on Account of Cruelty—Acts of Violence—Nature and Effect—Apprehension of Future Danger—Offer to Receive Wife back—Undertaking to Treat her Properly—Dismissal of Action.

In an action for alimony it appeared that the parties had been married for more than 25 years and had seven children. The wife left her husband in 1917, and refused to return to him; he was willing and offered to receive her back. Acts of violence by the husband in 1899, 1912, 1913, and 1917, just before the wife left him, were established; but it was *held*, that, although the husband had been violent, harsh, and domineering, and had alienated the affections of his wife and children, his acts of violence were not of such a character as to have produced in the plaintiff physical illness or mental distress of a nature calculated permanently to affect her bodily health or endanger her reason, and that there was no reasonable apprehension that in the future acts would occur likely to produce such a result.

The action was dismissed, upon the defendant signing and filing an undertaking to receive back his wife and children and to treat his wife in all respects with consideration as a wife should be treated and to abstain from all acts of violence.

Judgment of MASTEN, J., affirmed.

AN action for alimony.

December 2, 1918. The action was tried by MASTEN, J., without a jury, at North Bay.

G. L. T. Bull, for the plaintiff.

G. A. McGaughey, for the defendant.

January 23, 1919. MASTEN, J.:—The defendant is a bridge foreman in the employ of the Canadian Pacific Railway Company, residing at North Bay, in the district of Nipissing, and the plaintiff is his wife. The parties were married on the 8th September, 1892. The plaintiff is 52 years of age, and I should judge that the defendant is approximately of the same age, though his age was not stated in evidence. They have seven children.

The plaintiff is not living with her husband at the present time. She left him on the 24th March, 1917, and the writ in this action was issued on the 2nd May, 1917.

The trial of the case was adjourned at the last sittings in order that efforts might be made to bring the parties together, but the plaintiff now firmly asserts that she has no notion of going back to live with her husband. The husband, on the other hand, has a house in North Bay, and offers to take back his wife and family

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at any time, and desires them to return to his home and live with him. I find that this offer is *bonâ fide*. As to its effect—see *Evans v. Evans* (1916), 27 O.W.R. 69, at p. 70, 11 O.W.N. 34, 35, and *Forster v. Forster* (1909), 1 O.W.N. 93.

The matter therefore resolves itself into a question of whether, upon the evidence as adduced, the plaintiff has shewn that the defendant has subjected her to treatment likely to produce and which did produce physical illness and mental distress of a nature calculated permanently to affect her bodily health or endanger her reason, and that there is a reasonable apprehension that the same state of things will continue—so that there is an absolute impossibility that the duties of the married life can be discharged.

Upon the most careful consideration that I have been able to give to the evidence, I have, with much doubt, arrived at the conclusion that the case has not been brought within the principles established in the jurisprudence of Ontario relative to the granting of alimony; but, as the circumstances undoubtedly bring it very close to the line, I proceed to state my findings of fact for the assistance of any appellate tribunal before which the action may come on appeal.

It is clear, and I find as a fact, that the conduct of the defendant in his family has been habitually imperious, arrogant, and dictatorial, and at times mean and unreasonable, to such a degree that he has permanently alienated the affections not only of the plaintiff but also of all his children. He admits that they are all against him, and he characterises all their evidence as to his violent actions as sheer inventions.

In this statement I think he is incorrect, and I find that acts of violence are established.

My conclusion, however, is based upon the fact that these acts of violence are not of such a character as to have produced in the plaintiff physical illness or mental distress of a nature calculated permanently to affect her bodily health or endanger her reason, and I find that it is not established that there is reasonable apprehension that in the future acts will occur likely to produce such a result. I think that she is not afraid of him, and I think she would not be in any danger if she continued to live with him.

I find that the statements made in evidence on behalf of the

plaintiff as to the violence of the assaults upon her are seriously exaggerated. The defendant is a sober, industrious, hardworking man, holding an excellent and important position as foreman of bridge construction on a section of the Canadian Pacific Railway.

I find against the allegations as to his failure properly to maintain his family, and I am satisfied on the evidence that he did furnish the plaintiff with all proper necessities according to his position in life.

Upon the whole testimony, and considering the demeanour of the witnesses and the manner in which their evidence was given, I find that the acts of violence proved were not such as to cause reasonable apprehension of danger to the life, limb, or health of the wife. In the witness-box the plaintiff appeared a strong and healthy woman, both able and willing to maintain her views and enforce her rights, real or supposed, in the domestic forum.

It was admitted by the plaintiff in the course of her evidence that for six years prior to her leaving her husband, in March, 1917, she had declined to have marital intercourse with him and had occupied a separate room.

The husband acknowledged that he had not specifically requested a resumption of marital intercourse, but said that the circumstances under which she had withdrawn herself were such as to make it plain that such a request was useless; and, having regard to the manner in which the plaintiff's testimony was given, I give credit to that statement of the husband.

Four specific cases of violence are specially detailed in the evidence:—

The first occurred in the year 1899, the second in the year 1912, the third in the year 1913, and the last in March, 1917.

I deal first with this more recent act, which was given in greater detail.

The plaintiff's account of the occurrence is that on the evening of the 21st March, 1917, the defendant came home to his supper, and, differences having arisen in regard to there being no tablecloth on the table, "he took up the table and struck me with it in the side and said, 'You had better pack your rags and get out of here or it will be the end of me.'" She says the blow was such that she was in bed for a week and had to have the doctor.

Dr. Ranney, a physician practising in North Bay, was called,

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and says he attended the plaintiff in March, 1917—paid one visit and found her in bed. He said there was a contusion on the hip, and from the statements made to him he believed the corner of the table had been pushed against her, and she had been struck with the corner in the hip. The doctor did not make a second visit, and the impression produced on my mind by his evidence is that he did not regard the bruise as serious.

Edith Bailey, a daughter living at home at the time, gives her account of the occurrence, saying that her father came in and demanded that the table be properly set and that a table-cloth be put on, and was told that he could not have one, as the table-cloth was dirty. On his further demand that it be put on anyway, this was refused by the plaintiff, and she says that the defendant then said "he would soon clear the table off," and that he tipped up the table, slid the dishes to the floor, tramped on them, and that his language to the plaintiff was very violent. "The dishes were thrown to the floor and the table was upside down." She said that, when her father demanded the table-cloth and her mother refused to put it on, she (Edith Bailey) went to get it, and her mother did not stop her—she went to the clothes-basket, but could not find it, and nothing further was done.

The defendant's account of the matter is that, upon his demanding that the table be set with a table-cloth, his wife refused to allow him to have a table-cloth, and that there was exasperation and a verbal quarrel over this phase of the matter for a time; that, when the daughter Edith went to get the table-cloth, her mother commanded her not to bring it out; that he then upset the dishes off the table. He denies that he lifted it or struck the plaintiff with it or that he injured her in any way. The size of the table is not mentioned by any witness.

There was evidently an undercurrent of animosity on both sides, which readily broke into a quarrel: I find that the husband did not pick up the table and hit his wife with it, but I also find that there was violence, and that the corner of the table struck the wife—whether or not by intention of the husband I cannot determine.

I think that a squabble of this kind would not have warranted the Court in pronouncing a decree of divorce *à mensâ et thoro* under the former laws of England. I can add nothing to the

summary of our law on alimony as set forth by Riddell, J., in *McIlwain v. McIlwain* (1916), 35 O.L.R. 532, at p. 538, 28 D.L.R. 167, 172, 173:—

“From the institution of the Court of Chancery in Upper Canada in 1837, it exercised jurisdiction to decree alimony in a proper case: *Soules v. Soules* (1851), 2 Gr. 299; and very early laid down that, to obtain such a decree on the ground of cruelty the *sævitia* must tend to bodily harm or to the injury of the health, and in that manner render cohabitation unsafe: *Severn v. Severn* (1852), 3 Gr. 431, at p. 435; so that the wife cannot ‘safely return to her husband.’ *Jackson v. Jackson* (1860), 8 Gr. 499, at pp. 505, 506; and that was the reason of the rule, both here and in England, that an isolated act of personal violence gave the wife no right to leave her husband: *Rodman v. Rodman* (1873), 20 Gr. 428. ‘The law . . . lays upon the wife the necessity of bearing some indignities, and even some personal violence.’ *ib.*, pp. 430, 431. ‘The ground of the Court’s interference is the wife’s safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread.’ *ib.*, p. 431, quoting Lord Penzance in *Milford v. Milford* (1866), L.R. 1 P. & D. 295. There must be a reasonable apprehension or a probable danger of personal violence: *Bavin v. Bavin* (1896), 27 O.R. 571, at p. 578, citing *Bramwell v. Bramwell* (1831), 3 Hagg. Eccl. 618, at p. 635.

“It is useless to multiply cases—the law is authoratively laid down in *Lovell v. Lovell* (1906), 11 O.L.R. 547; *S.C.* in appeal (1906), 13 O.L.R. 569. I adopt the criterion of Moss, C.J.O., p. 571—‘a question on the facts whether the plaintiff has shewn that the defendant has subjected her to treatment likely to produce, and which did produce, physical illness and mental distress of a nature calculated to permanently affect her bodily health and (or) endanger her reason, and that there is a reasonable apprehension that the same state of things would continue’—adding only the statement of Lord Stowell in *Evans v. Evans* (1790), 1 Hagg. Con. 35: ‘The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged’ (p. 37). This is substantially what is laid down in *Russell v. Russell*, [1897] A.C. 395.”

The cases of *Payne v. Payne* (1905), 10 O.L.R. 742, *Ruttle v. Ruttle* (1912), 23 O.W.R. 575, 4 O.W.N. 457, *McIlwain v. McIlwain*,

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supra, and *Forget v. Forget* (1918), 40 D.L.R. 662, afford illustrations of the application of these principles in circumstances like the present.

I proceed to consider the earlier difficulties detailed in the evidence. Assuming that the quality of the later act is such that though repeated it would not support an action of alimony, I do not myself see how it can revive earlier acts of cruelty which have been condoned. However, some of our decisions support the opposite view, and accordingly I proceed to discuss the evidence relating to the three earlier occasions mentioned above.

I pause, however, to say that, assuming them to be revived so that they are admissible in evidence, it yet remains to consider their effect and the real issue on which they bear. That issue is as to whether the earlier acts indicate such a lack of self-control on the part of the husband or such an habitual tendency to legal cruelty as to establish the conclusion that the earlier coupled with the later acts have produced physical illness or mental distress permanently affecting the wife's bodily health or endangering her reason, or that there is reasonable apprehension or fear that, if the wife were to return to the husband's house, she would suffer cruelty tending to the injury of her health.

In adjudicating on such evidence the conclusions to be drawn from events which took place, eighteen, six, or even five years ago, which have been condoned in law by subsequent co-habitation and again revived, must be largely influenced by the lapse of time and by the intervening conduct of the parties. They cannot, in my opinion, lead as sharply and definitely to a finding of legal cruelty as they might have done if the action had been brought at the time when they occurred. In this view I proceed to deal with these three earlier occasions on which cruelty is alleged to have been inflicted on the plaintiff.

Regarding the first occasion, that of 1899, the plaintiff says that the defendant struck her in the stomach and she was in the hospital for some weeks. When she got out she left him and lived away from him until 1902, at which time he promised her to be good, and she returned to him. During these three years the defendant had two of the children with him and the plaintiff had two with her. On this occasion the defendant was summoned before a magistrate for assault, and the charge was dismissed.

They afterwards lived together from 1902 to 1912 without any outbreak of violence, so far as appears from the testimony, and three more children appear to have been born, as the family now consists of seven children.

The defendant denies the violence alleged against him and says that the statements made in that regard are sheer fabrications. I do not give credit to so broad a statement: I think that there was violence, but it was so many years ago, that, coupled with the fact that the charge of assault in the police court was dismissed, I do not think that at this date it is sufficient to enable me to act on it.

With respect to the occurrences of 1912 and 1913, I find that on both these occasions there was considerable provocation on the part of the plaintiff, and that, as in the case of 1917, the whole occurrence was largely in the nature of a family squabble rather than in the nature of any dangerous violence.

The defendant undertakes to receive back his wife and children, and has always been ready and willing to do so, and desires her to return to his home in North Bay, and undertakes also to treat the plaintiff in all respects with consideration as a wife should be treated and to abstain from all acts of violence.

Upon this undertaking being formally given, signed by the defendant personally and filed with the Registrar, I direct that the action be dismissed. There will be the usual order for costs in case of dismissal as provided in Rule 388.

The plaintiff appealed from the judgment of MASTEN, J.

March 20. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

A. G. Slaght, for the appellant. The learned trial Judge found that the husband by his conduct had permanently alienated the affections of his wife and children; and it would of necessity injuriously affect the mental condition and the health of the wife if she were obliged to return and live with the husband. It would amount to the compelling of an unnatural association. The test, under the English and Canadian authorities, to determine whether the wife should be ordered back, is, whether her health would probably be affected by the return. Evidence at the trial disclosed

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physical violence and cruelty, and a harsh and domineering spirit on the part of the husband, and there would be great danger of physical injury to the wife if she returned to live with him.

R. McKay, K.C., for the defendant, was not called upon.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:— After a careful and protracted trial, and after mature consideration after the trial, the learned trial Judge came to the conclusion: that there were not sufficient grounds for the Court's approval of the wife's voluntary separation from her husband, approval evidenced by a judgment for alimony, so that such separation might be continued as long as the wife chose to continue it; that the husband's few and far apart acts of cruelty—though they could not be too strongly condemned—were not very likely seriously to affect the health of either of them: that they might and should live out what remains of their joint lives as husband and wife: and we agree with him in that.

The husband was at times harsh and domineering; and his conduct in his conflicts with his wife inexcusable in some respects: but, on the other hand, the wife, instead of being tactful, was, at such times, actuated by a rebellious and stubborn spirit: between them making such inexcusable family scenes as that arising out of the petty dispute whether or not the table-cloth was "too dirty" to be used. To have awarded alimony would have been to do all the Court could to keep husband and wife and family always separated, always more or less at enmity one with the other: to have refused it was to have aided a reconciliation and living together; and all interests must be best served by that, if it be possible. The wife is not a woman weak in either mind or body, and she has all their children who are yet living at home, upon her side, so that serious bodily harm, at the hands of her husband, if he should be bad enough to attempt it, a thing very unlikely, is well guarded against: and, beside other things, this litigation has afforded another safeguard, and one of the greatest in such a case as this; it has made it plain to the man that misconduct towards his wife is unprofitable in a money sense, that it is very costly; and he has given his undertaking in writing to treat his wife in future, as he should have done in the past, in all

things as a man should treat his wife—a wife of so many years and a mother of so many of his children.

It seems to me to be quite reasonable to hope that, now, husband and wife and family shall live together, the few at most remaining years of a long married life, at least in peace one with another; and so avoid the stigma upon the family of a separated mother and father and all the other disadvantages of such a divorce: but, if not, the mistake is not remediless; another action for alimony would lie, in which all that has taken place could be taken into consideration.

We are all in favour of dismissing the appeal: costs should be allowed to the wife in so far as Rule 388 permits.

Appeal dismissed.

[SUPREME COURT OF CANADA.]

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May 2.

Highway—Municipal By-law Authorising Closing and Sale of Part of Street—Invalidity.

The judgment of the Appellate Division, 33 O.L.R. 634, was reversed, and the judgment of LATCHFORD, J. (*ib.*), declaring the by-law in question invalid *in toto*, restored.

AN appeal by Jones and others, the plaintiffs in an action against the Corporation of the Township of Tuckersmith and one Kruse, and the applicants in an application for an order quashing a by-law of the township, from the judgment of a Divisional Court of the Appellate Division, 33 O.L.R. 634, allowing in part an appeal by the township corporation from the judgment of LATCHFORD, J. (*ib.*), which was in favour of the plaintiffs and applicants both in the action and upon the motion, and holding that sec. 2 of the by-law should be quashed, and the conveyance to the defendant Kruse be set aside and the registration thereof be vacated, and that the action and motion, so far as sec. 1 of the by-law was concerned, should be dismissed.

The appeal to the Supreme Court of Canada was originally only from the order made upon the motion to quash; but the Divisional Court, in February, 1917 (11 O.W.N. 367), made an

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order extending the time for appealing from the judgment in the action; and the judgment as well as the order was then included in the appeal to the Supreme Court of Canada. The defendants filed a factum in which they contended for the reversal of the part of the judgment LATCHFORD, J. (left untouched by the Appellate Division), which set aside the sale and conveyance to Kruse.

May 29, 1916. The appeal was heard by FITZPATRICK, C.J.C., DAVIES, IDINGTON, ANGLIN, and BRODEUR, JJ.

William Proudfoot, K.C., for the appellants.

R. S. Robertson and *R. S. Hays*, for the respondents.

March 12, 1917. The case was mentioned to the Court again, after the extension of time for appealing in the action had been granted by the Ontario Court.

THE COURT allowed the appeal in the action to be inscribed for hearing, and reserved judgment upon both appeals.

May 2, 1917. IDINGTON, J.:—The appellants brought an action to quash a by-law of the respondent township and obtain other relief. The by-law by its first clause pretended to close part of an alleged street called Mill street in an unincorporated village within the township; and by its second clause to authorise the execution of a deed of conveyance of the said portion of Mill street to the highest bidder therefor.

After instituting the proceedings by way of action, the appellants proceeded by way of motion to quash the by-law, and upon that motion Mr. Justice Middleton made an order quashing the by-law: *Re Jones and Township of Tuckersmith* (1914), 5 O.W.N. 759, 25 O.W.R. 680.

Upon appeal that order was reversed, but leave was given to renew the motion before the presiding Judge at the trial of the action: *Re Jones and Township of Tuckersmith* (1914), 6 O.W.N. 379. In that order of reversal there was provision made, amongst other things, that the said presiding Judge was not to be bound by the judgment of Mr. Justice Middleton, and that the respondent was not to be permitted on the trial of the action to raise as a defence therein the question of the right of the appellants to proceed with the action without setting aside the by-law.

On the trial of the action the motion was renewed, and two separate judgments, bearing the same date, were entered by Mr. Justice Latchford. The judgment upon the motion, reciting however the evidence in the action as well as affidavits on the motion, quashed the by-law. That in the action, again reciting both classes of evidence, merely set aside the conveyance made pursuant to the by-law, and declared other relief incidental thereto.

From each judgment the respondent appealed to a Divisional Court, and both appeals were heard together, but separate formal judgments were entered bearing the same date. That in regard to the motion to quash set Mr. Justice Latchford's judgment entirely aside, quashed clause 2 of the by-law, and dismissed the motion to quash clause 1 of the by-law. That in regard to the trial judgment in the action varied that judgment; and para. 2 of this varying judgment, as if it had been determined to establish beyond peradventure clause 1 of the by-law, provided as follows:—

“(2) And this Court doth further order and adjudge that in so far as the plaintiffs sought to impeach the validity of section 1 of the by-law of the defendant corporation in the pleadings mentioned the claim of the plaintiffs be and the same is hereby dismissed.”

The appellants, without leave got, launched an appeal here, as if from both judgments, and then applied to the Appellate Division for leave to appeal, but only got a leave limited to the judgment on the motion to quash.

After counsel for the appellants had argued very fully their appeal, without making any observations on the effect of this clause in the judgment in the action, and closed his argument, counsel for the respondents began theirs by contending that the effect of all that had transpired was that the validity of clause 1 of the by-law must be held as between these parties *res judicata*.

When the appellants' counsel replied, he asked, if we thought the point well-taken, to have the matter stand till he had a chance to apply again to the Appellate Division to get the leave expanded to cover that judgment also, so far as it touched the validity of clause 1 of the by-law.

I think this point taken by counsel for the respondents, both in their factum and in argument, is well-founded, and, unless relief is given by further leave to appeal, is fatal to this appeal.

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I come to that conclusion most reluctantly, for the appeal seems to me, to say the least, very arguable if we have regard either to the motive for the by-law, or its effect relative to the respective means of access of the respective appellants to their respective lots fronting upon that part of the street attempted to be closed thereby, or to the jurisdiction of a council over a street merely laid down upon a plan, and which it has refused to open or otherwise assume any responsibility for, in law, and which has not been accepted by it in any way.

The second of these grounds is, under all the peculiar circumstances in question, perhaps of minor importance, because the respondent township corporation, if the by-law is *intra vires*, may be made to compensate each party concerned in such a substantial way as to cover the appellants' injuries, and thus teach municipalities doing the like not to meddle with other people's property or rights unless and until the council has at least, in a due and orderly manner, asserted its jurisdiction over that with which it meddles. Had it taken time to do so, ownership by the appellant Jones of the single lot for which he got a conveyance would by that time have formed a barrier to the proceedings questioned herein.

We had an illustration presented to us in the case of *District of West Vancouver v. Ramsay*, argued this term,* of how such things work out.

In case, however, it should turn out, upon the appellants resorting to the provisions of the Municipal Act for compensation, and applying to the Courts to enforce that measure of relief, that the respondent should set up that this by-law in clause 1 was *ultra vires* the municipality, and this Court ultimately maintain that objection, would there not be a lamentable failure of justice?

In the *West Vancouver* case this is the very contention set up. In holding, as I did, that the power there exercised was *intra vires* the municipality, it was not necessary to consider the point of *res judicata* discussed in argument therein or to consider the authorities cited. The point raised there, it was argued, was met by the decision of the Judicial Committee of the Privy Council in the case of *Toronto R.W. Co. v. Toronto Corporation*, [1904] A.C. 809. The case was not relied upon herein, but it illustrates the legal situation that results or might result herein. It seems, though the converse case, to tend to maintain the position that

*Now reported (1916) 53 Can. S.C.R. 459.

this judgment of the Appellate Division is *res judicata*, for clearly the Court had jurisdiction to decide this case, whereas in that case the Judicial Committee decided that the Courts below had not jurisdiction to determine the point raised there.

I think the late Mr. Justice Street in the case of *Roche v. Ryan* (1892), 22 O.R. 107, was right, and Mr. Justice Middleton in this very case was right, in the construction put upon the statute, and that the decision of this Court in *Gooderham v. City of Toronto* (1895), 25 Can. S.C.R. 246, does not require another construction of the statute as it stood when respectively dealt with by either of these learned Judges who passed upon the question raised.

To begin with, the jurisdiction of the council to close a road or street depends upon the following provision of the Municipal Act, 1903, 3 Edw. VII. ch. 19:—

“637. • The council of every county, township, city, town and village may pass by-laws—

“1. For opening, making, preserving, improving, repairing, widening, altering, diverting, leasing, selling, or stopping up roads, streets, squares, alleys, lanes, bridges, or other public communications wholly within the jurisdiction of the council.”

I need not elaborate now, but state and refer those conversant with the Municipal Act to its provisions, from which it will appear that the words “within the jurisdiction of the council” refer not to any merely territorial jurisdiction, but to the actual jurisdiction conferred by the Act and what has been done pursuant thereto. Every road is, territorially speaking, within the county, but not within its jurisdiction, in the language I quote. Hence we must look to what has by the course of events fallen within its jurisdiction over any road.

Even assuming for a moment, which I do not, that the “public road,” etc., referred to in sec. 601 of the Municipal Act, 1903, vested in the municipality, it certainly cannot be said to have jurisdiction over it as a street simply by an Act of the Legislature vesting the legal estate of the soil in it, when, as the enactment presumes, a road has been duly constituted a public highway, unless and until it has assumed its jurisdiction over it as a street.

The municipality, for example, generally has its town-hall vested in it as a property, and often other property; but that would not enable it to sell the same under the above provisions relative to the jurisdiction to sell a street.

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It is not the soil of all the public highways within its border which a municipality can have vested in it, but those only to which it has assented to being so vested.

It is elementary law that no real estate can vest in any one against his will and without his assent, unless incidentally to some statutory obligation. It is equally elementary that when a statute has imposed a duty upon any one in relation to real estate and declared that it shall for that purpose or in any event vest in him, it does so vest by operation of law.

But where do we, if we observe these principles, find anything to justify us in maintaining the construction put upon a clause in the Municipal Act that will extend its operation to the language used in another Act for another purpose and defining other rights?

Neither the Surveys Act nor the Registry Act forms part of the Municipal Act, or is incorporated therein in this regard.

The former defines certain roads or streets which may be held to be public highways, and the latter Act provides for the extinction of such roads or streets on certain conditions and consents given by order of a Judge.

It does not provide for the municipality being a party to any such application; but, on the one hand, can any one conceive of a Judge, being moved in such a case, desisting therefrom simply because a municipality did not recognise the street on the plan as its highway, yet claimed the freehold in the soil, or, on the other hand, proceeding to make an order after it had been made clear that the municipality had assumed it as a street, unless and until the latter had stopped it up?

There is in fact often a shifting jurisdiction, as it were, by these rural municipalities, county and township, in relation to roads within their borders. I do not say that it is likely to apply here further than as illustrative of the absurdity of a township corporation owning a highway which it repudiates. And there may be public highways without county or township having jurisdiction over them.

These several provisions do not overlap or conflict, but can be given a construction consistently with each being allowed all the operation it ever was intended to have, by reading the Municipal Act as the late Mr. Justice Street read it and Mr. Justice Middleton reads it in this case.

I need not further elaborate but adopt their respective arguments. I, therefore, cannot avoid coming to the conclusion that we ought to accede to the request of counsel for the appellants.

I had written the foregoing shortly after the argument herein, when, upon the conclusion I had so reached, it seemed to be our duty to give an opportunity to the appellants to obtain leave to appeal also from the judgment which constituted a *res judicata* barring our right to interfere.

That leave has been granted, and the whole matter involved is now presented to us for final disposition thereof.

I may add to what I have already stated relative to the alleged road allowance on the plan being a highway within the jurisdiction of the council, that it was clearly established at the trial that people presumably interested in having that road allowance opened as one within the jurisdiction, by virtue of the said registered plan and all in law mentioned therein, of the respondent's council to open, petitioned the council to open it, yet the council declined to do so within a few weeks before the passing of the by-law in question.

This circumstance is not only important as a repudiation of that jurisdiction which I hold essential to any exercise of the power to close such a road allowance, but also as indicative of the willingness of the council to lend itself to the promotion of private rather than public interests.

I agree in the conclusion reached by the learned trial Judge that serving private interests, rather than a strict observance of their public duty, was so evident as to vitiate the transaction within the principles upon which the decision in *Re Morton and City of St. Thomas* (1881), 6 A.R. 323, proceeded.

I adopt the conclusion of the learned Judge as having been properly reached, as I understand the facts. It is not necessary to join in his criticism of the solicitor.

I do not, from a consideration of it, see much similarity between what appears therein and what was presented for consideration in the case of *United Buildings Corporation v. Corporation of the City of Vancouver*, [1915] A.C. 345, 19 D.L.R. 97.

The by-law being in my view *ultra vires*, and for this latter cause having been improperly passed, I need not enter upon the question of the appellant Jones's ownership of the single lot, which I have already referred to.

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I may, however, remark that, if he was the purchaser, and thus at the time of the passing of the by-law owner in equity, as the learned trial Judge holds, of that lot, there would seem to have been a barrier in the way of passing the by-law.

The appeal, I think, should be allowed with costs here and in the Appellate Division, and the judgment of the learned trial Judge restored.

FITZPATRICK, C.J.C., agreed with IDINGTON, J.

ANGLIN, J.:—The plaintiffs attack a by-law of the council of the respondent township which closed a portion of Mill street, in the village of Egmondville, and provided for the sale thereof to the respondent Kruse, on 4 chief grounds: (a) that the portion of Mill street in question was not a public highway, because it has never been opened or assumed expressly or otherwise by the municipal corporation, and that it was therefore not within the jurisdiction of the council; (b) that the by-law was passed in contravention of the spirit, if not of the letter, of clause (c) of sec. 632 of the Municipal Act of 1903; (c) that the failure of the municipal corporation to provide for the plaintiffs, who owned lots abutting on the closed portion of Mill street, some other convenient road or way of access to such lots, as required by sec. 629 (1) of the Municipal Act of 1903, invalidated the by-law; (d) that the provision for sale to Kruse and the conveyance to him were in contravention of clause 11 of sec. 640 of the same Act, and consequently void.

An action to set aside the by-law and the conveyance was begun on the 13th September, 1913, and on the 14th December of the same year a motion to quash the by-law was also launched.

When the motion came on for hearing before Middleton, J., he set aside the by-law on ground (a). His order was vacated on appeal, however, and the motion was directed to stand for disposition by the Judge who should try the action.

Pursuant to this order, both the motion and the action came on before Latchford, J. After taking oral evidence, which it was agreed should form part of the material upon the motion as well as in the action, that learned Judge, while of the opinion that, by virtue of sec. 44 of the Surveys Act (1 Geo. V. ch. 42), the portion of Mill street in question was a public highway subject to the

jurisdiction of the defendant council, apparently thought that the plaintiffs should succeed on ground (b), and definitely held that the by-law was invalid on ground (c). It of course followed that the sale and conveyance to Kruse should also be set aside.

The Appellate Division agreed with Latchford, J., that the portion of Mill street in question had become a public highway, but thought that the plaintiffs had failed to make a case either on ground (b) or on ground (c) for quashing the portion of the by-law which provided for the closing of the street. They held the part of the by-law providing for the sale to Kruse and the subsequent conveyance to him invalid, however, because of non-compliance with clause 11 of sec. 640 (ground (d)), the council having failed first to offer to sell the property to the abutting owners at a price fixed by it.

The vicissitudes of this litigation in the Provincial Courts appear more fully in the reports in 5 O.W.N. 759, 25 O.W.R. 680; 6 O.W.N. 379; and 33 O.L.R. 634.

Against the portion of the judgment of the Appellate Division which upholds the part of the by-law closing the street the plaintiffs now appeal to this Court. Originally their appeal was confined to the judgment on the motion to quash the by-law. But, having obtained an extension of time from the Appellate Division, they have now appealed to the same extent against the judgment in the action also, and the defendants have filed a factum in which they contend for the reversal of the part of the judgment of Latchford, J. (left untouched by the Appellate Division), which set aside the sale and conveyance to Kruse. It will not be necessary to deal with this phase of the case, because of the conclusion which I have reached on the plaintiffs' appeal.

I am by no means satisfied that in passing the impugned by-law the council conformed to the spirit of sec. 632 (c) of the Municipal Act. It was apparently well understood at the final meeting in December, 1912, when the matter was left over to be dealt with by the new council, that the question of closing Mill street would not be disposed of without giving the persons opposed to that project, who were then before the council, an opportunity of again being heard before the new council; and I incline strongly to think that the passing of a by-law at the inaugural meeting in 1913 was not in accord with that understanding. But I prefer to

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rest my opinion in favour of the appellants on ground (c), viz., that the by-law contravenes sec. 629 (1), in that no provision is made by it for some other convenient road or way of access to the plaintiffs' lands which abut on the closed portion of the highway.

In the Appellate Division this aspect of the case was dealt with by the learned Chief Justice of Ontario, who delivered the judgment of the Court. [The learned Judge quoted from pp. 659 and 660 of 33 O.L.R., five paragraphs, beginning "The third ground of attack."]

While it is, no doubt, the fact that the plaintiff Jones obtained his deed only on the day after the by-law was passed, the evidence, I think, satisfactorily establishes that he had made an agreement to buy lot 40 some 4 to 6 weeks before, and that he purchased it for the purpose of placing a building upon it. The delay in closing the transaction and executing the deed is accounted for by Jones and his vendor. It was due to some title-deeds having been mislaid. The *bona fides* of Jones's purchase was not doubted by the learned trial Judge. I am, with respect, unable to share the "strong suspicion" of the learned Chief Justice of Ontario that "his purchase was made for the purpose of making it impossible to pass the by-law, or to pass it without providing some other means of access to the lot."

Moreover, such a suspicion, however strong, scarcely justifies the position taken that "the case must be dealt with as if his (Jones's) lot, at the time of the passing of the by-law, had been still owned by the persons who sold to him."

Mill street was the only means of access to lot 40. Jones did not own any adjoining property. *In re McArthur and Township of Southwold* (1878), 3 A.R. 295, relied on by the learned Chief Justice, has no bearing on this state of facts. The complainant in that case was the owner of a farm, which might be entered from two roads, each of which afforded a "convenient way of access." The municipal council closed one of these roads. The Court held that the remaining road afforded a means of access which would have satisfied the requirements of the statute if it had been provided by the council as a substituted or "other convenient road or way of access," and that under such circumstances the statute did not require the council to provide still another road in lieu of that closed.

The situation in which the by-law leaves Jones in regard to his lot, i.e., without any means of "ingress or egress to and from his lands," is, I think, fatal to its validity. I agree with Mr. Justice Latchford's view that the words "any public road or highway," in sec. 629 (1), were not intended to express the idea that such road or highway must have been in actual use as "a means of access." As Burton, J.A., said in the *Southwold* case, at p. 300: "It would be a strange construction that would make a man's rights to the full enjoyment of the advantages of a road abutting upon his land dependent upon such an accident."

An unopened statutory highway, which when opened will afford means of access, is within the scope of the section.

There is evidence to support the view that lot 29 on Mill street, owned by the plaintiff Grieves, is presently occupied by him as one property with the adjoining lot 15 on Centre street, which he also owns, and that the entrance to both lots has been from Centre street, as indeed it had to be while Mill street remained unopened. There is no such evidence of occupation as one property, however, in the case of the plaintiff Robinson, who owns lots 35 and 36 on Mill street and the adjoining lots 21 and 22 on Centre street. Robinson holds the two former lots, he tells us, with the intention of giving them to his two boys, one to each, presumably for residential purposes.

Even in Grieves's case, I question the applicability of the decision in the *Southwold* case. Why should Grieves and his successors in title be compelled to hold and use the Mill street lot for all time in connection with the lot on Centre street? Why should they be deprived of the only means of access to the former which would enable them to deal with and dispose of it as a separate holding? The effect of laying out a property in separate lots after registration of a plan, which has become binding as a result of sales made according to it, was recently much considered in *Canadian Northern Ontario R.W. Co. v. Holditch* (1914), 50 Can. S.C.R. 265, 20 D.L.R. 557, *Holditch v. Canadian Northern Ontario R.W. Co.*, [1916] 1 A.C. 536, 27 D.L.R. 14. The view there taken seems scarcely consistent with the idea that, merely because two lots on such a plan adjoin one another, they should be treated as one property. Whatever may be thought of Grieves's case by reason of the use which he has heretofore made of his Mill street lot, there seems

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to be no good reason for holding that the plaintiff Robinson, as well as Jones, has not been "excluded from ingress and egress to and from his lands . . . over such road"—i.e., over the portion of Mill street which has been closed—within the meaning of sec. 629 (1).

For the Jones and Robinson lots—certainly for the Jones lot—Centre street does not afford such "other convenient road or way of access" as would satisfy the statute and render it unnecessary for the council, on the authority of the *Southwold* case, to provide another convenient road in lieu of that which they have attempted to close.

I am, for these reasons, of the opinion that the by-law in question is invalid, and that the judgment of the learned trial Judge quashing and setting it aside should be restored. The appellants are entitled to their costs in this Court and in the Appellate Division, to be paid by the respondent township. Having regard to the circumstances under which the respondent Kruse was brought before this Court, while he is certainly not entitled to any costs, I would be disposed to excuse him from payment of costs.

DAVIES, J., agreed with ANGLIN, J.

BRODEUR, J., expressed no opinion.

Appeal allowed.

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ABELL v. VILLAGE OF WOODBRIDGE AND COUNTY OF YORK.

Highway—Dedication of Land as Public Highway Subject to Right of Land-owner to Maintain Raceway under Surface—Municipal Act of 1913, secs. 432, 433—Repeal of Municipal Act of 1903—Removal of Qualification—Soil and Freehold of Highways Vested Absolutely in Municipal Corporations.

The judgment of MASTEN, J., 39 O.L.R. 382, was reversed (MIDDLETON, J., dissenting).

Held, by the majority of the Court, that the plaintiff had no right to maintain a raceway in connection with his mill property under the surface of P. street, in the village of W.

P. street was originally a road leading to the mill of a predecessor in title of the plaintiff, and the raceway crossed this road. In the progress of time the road became, by reason of its use by the public, with the permission of the owner of the mill property, a public highway by dedication, and the road as dedicated was subject to the right of the mill-owner to maintain the raceway. Before the passing of the Municipal Act of 1913, 3 & 4 Geo. V. ch. 43, P. street was, by force of the Municipal Act of 1903, 3 Edw. VII. ch. 19, sec. 601, vested in the municipality of W., subject to the right of the mill-owner to maintain the raceway. The effect of secs. 432 and 433 of the Act of 1913 and of the repeal of the Act of 1903 was to remove the qualification to which under that Act the vesting of the highway was subject, and to vest, absolutely and without qualification, the soil and freehold of them in the municipal corporations.

Per MIDDLETON, J.—The declaration in the Act of 1913 that the title to all highways shall be vested in the municipality had the effect of vesting in the municipality the title to roads that theretofore had been in His Majesty; it was not the intention of the Legislature to interfere with existing rights or to enlarge the effect of an earlier dedication of a highway; full effect could be given to the words of the statute by confining their operation to vesting in the municipality the title which had been conveyed subject to all existing reservations.

AN appeal by the defendants from the judgment of MASTEN, J., 39 O.L.R. 382, 37 D.L.R. 352.

April 2, 1918. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and MIDDLETON, J.

November 21, 1918. The case was again spoken to, when the Court informed counsel of the result of inquiries into the earlier history of the case, especially affecting the question of lost grant.

O. L. Lewis, K.C., and C. W. Plaxton, for the appellant the Corporation of the County of York. The question is one of a license claimed by the plaintiff, to carry a stream of water across a highway, formerly in the control of the village corporation, now in the control of the county corporation. If, as the plaintiff claims, he is entitled to an easement, it is merely an artificial one, for a temporary purpose, and for it a lawful origin cannot be

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presumed: Halsbury's Laws of England, vol. 11, pp. 267, 316, 317; *Burrows v. Lang*, [1901] 2 Ch. 502; *Schwann v. Cotton*, [1916] 2 Ch. 120, 459. Even if the easement existed, it had been abandoned since 1900, and could not now be claimed: see *Watson v. Jackson* (1914), 31 O.L.R. 481, 499, 19 D.L.R. 733. The maintenance of the easement involved the existence of a nuisance, which gave the corporation a right to interfere: *Attorney-General v. Harrison* (1866), 12 Gr. 466, 473; *Hunter v. Richards* (1912), 26 O.L.R. 458, affirmed (1913) 28 O.L.R. 267. They also referred to *Roche v. Ryan* (1892), 22 O.R. 107, and to secs. 325 and 326 of the Municipal Act, R.S.O. 1914, ch. 192, arguing that the plaintiff could only claim compensation for his damage if he had suffered any, the amount to be settled by arbitration if the parties could not agree.

W. A. Skeans, for the appellant the Corporation of the Village of Woodbridge, argued that the plaintiff had suffered no damage through the acts of the appellants.

J. H. Moss, K.C., and *W. Lawr*, for the plaintiff, the respondent, argued that the judgment of the trial Judge as to the presumption of a lost grant should be supported. They relied on the *Schwann* case, *supra*, [1916] 2 Ch. at pp. 120, 135, 459. There had been no abandonment of the easement and money had been laid out in maintaining it. The Municipal Act was not pleaded.

Lewis, in reply, said that in the *Schwann* case the user was continuous, which distinguished it from the case at bar.

January 27, 1919. MEREDITH, C.J.O.:—This is an appeal by the defendants, the Corporation of the Village of Woodbridge and the Corporation of the County of York, from the judgment dated the 13th April, 1917, which was directed to be entered by Masten, J., after the trial before him sitting without a jury at Toronto on the 25th and 26th January and 16th February of the same year (39 O.L.R. 382).

The contest is as to the right of the respondent to maintain a raceway in connection with his mill property under the surface of a highway called Pine street, in the village of Woodbridge.

At the trial, there was nothing to shew the origin of the highway, and my brother Masten presumed a lost grant of an easement to which the highway was subject.

Since the argument, by the courtesy of Mr. Irwin, the Clerk of the Peace for the County of York, the Court has been put in possession of documentary evidence from which the origin of the highway is satisfactorily shewn.

The inference I would draw from these documents is that what is now Pine street was originally a road leading to the mill of a man named Burr, a predecessor in title of the respondent, and that the raceway crossed this road. In the progress of time the road became, by reason of its use by the public, with the permission of the owner of the mill property, a public highway by dedication, and the road as dedicated was subject to the right of the mill-owner to maintain the raceway. It is unnecessary to determine whether this right was an easement, or the land occupied by the raceway was the property of the mill-owner, subject to the public right of passage over it.

As the law stood down to the passing of the Municipal Act, 1913 (3 & 4 Geo. V. ch. 43), Pine street was vested in the Corporation of Woodbridge, subject to the right of the mill-owner to maintain the raceway.

The law applicable before the passing of that Act was the Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 601, which provided that:—

“Every public road, street, bridge or other highway in a city, township, town or village,—except . . . shall be vested in the municipality, subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway.”

It was held by a Divisional Court in *Roche v. Ryan*, 22 O.R. 107, that the effect of this section (then sec. 527 of R.S.O. 1887, ch. 184) was to vest not merely the surface but the freehold as well, subject to any rights reserved by the person who laid out the road, street, bridge or highway, and that case was followed in *Cotton v. City of Vancouver* (1906), 12 B.C.R. 497.

An important change was made in the law by the Municipal Act, 1913, 3 & 4 Geo. V. ch. 43. It provided, by sec. 433, that “the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act;” and, by sec. 432, “all

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roads dedicated by the owner of the land to public use" are declared to "be common and public highways."*

I see no escape from the conclusion that the effect of this legislation and of the repeal of 3 Edw. VII. ch. 19, which was concurrent with it, is to remove the qualification to which under that Act the vesting of the highways was subject, and to vest, absolutely and without qualification, the soil and freehold of them in the municipal corporations; and it follows that the respondent's action therefore fails. As the ground upon which our judgment rests was not taken at the trial or suggested upon the argument before us, while I would allow the appeal, reverse the judgment of my brother Masten, and substitute for it judgment dismissing the action, I would leave the parties to bear their own costs throughout.

It should be mentioned that, since the argument, the parties were informed of the point upon which the case turns, and that they put in written arguments as to it.

Since the foregoing was written, I have had an opportunity of reading the opinion of my brother Middleton.

While I agree with him that the construction I have placed on sec. 433 of the present Municipal Act may work hardship in some cases, I am unable to see my way to cutting down the plain and unambiguous language of the section. To do so would be, as it appears to me, not to interpret but to legislate, and to demonstrate once more that "hard cases make bad law."

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

MIDDLETON, J.:—In this case I have the misfortune of finding myself unable to accept the conclusion arrived at by my Lord the Chief Justice.

I agree with him that the proper inference to be drawn from the evidence now before the Court is that Burr, the predecessor in title of the plaintiff, dedicated the road in question as a public highway, and that the dedication was subject to his right as owner of the mill to maintain a raceway across the highway.

* Sections 432 and 433 of the Municipal Act, 1913, are re-enacted in secs. 432 and 433 of the Municipal Act, R.S.O. 1914, ch. 192.

It is well settled law that where there is a dedication by the owner of lands the public must accept the dedication in the terms in which it is given. The owner is under no obligation to dedicate, and he can dedicate subject to such terms and reservations as he chooses to impose, and if the public accept the use of the highway it is accepted subject to the terms and conditions imposed, and there is no injustice in holding them to the terms on which the benefit was conferred. If authority is needed for this, see *Cooper v. Walker* (1862), 2 B. & S. 773. I do not understand that my Lord in any way differs from this view of the law.

Until the statute of 1913, there were found provisions in the Municipal Act with reference to the title to highways which were regarded as difficult of interpretation, and in some sense conflicting. These provisions entirely differ from the common law, under which the public merely had the right to pass and repass along the way, the soil remaining the property of the freeholders dedicating, the presumption being that the adjoining owners were entitled "*ad medium filum*." The nature of the statutory provisions, and the theories put forward as to their effect, may be gathered from *Roche v. Ryan*, 22 O.R. 107, and from Mr. Biggar's annotations on secs. 599, 600, and 601 of the Municipal Act, R.S.O. 1897, ch. 223: Municipal Manual (1900).

In the revision of 1913, an attempt was made to get rid of all these difficulties, and to declare that the title to all highways should be vested in the municipality. This undoubtedly had the effect of vesting in the municipality the title to roads that theretofore had been vested in His Majesty. I cannot think that it was the intention of the Legislature otherwise to interfere with existing rights or in any way to enlarge the effect of any earlier dedication of the highway.

Under dedication, by formal conveyance or presumed from permitted user, the municipalities, before the passing of that Act, had acquired title to many roads subject to reservations in favour of owners of the adjoining lands, these reservations being in many instances of great value, and I fail to find in this statute anything which would indicate an intention on the part of the Legislature to destroy these valuable property rights. Full effect can be given to the words of the statute as it now stands by confining their operation to vesting in the municipality the title which had been conveyed subject to all existing reservations.

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That there must be some limitation to the broad meaning attributed to the words by those entertaining the contrary view, is obvious. Highways pass over streams and railways. It certainly never was the intention of the Legislature in any way to interfere with the title to the beds of those streams or the rights of navigation or floating of logs, or the rights of the railway companies.

In this case it is quite probable that the reservation of the right to maintain the raceway across the highway is not of any great value. If the municipality desires to end this right, it is open to it to expropriate; and, while I would confirm the judgment below, I would vary it by providing that it shall not become operative for a period of six months, to enable the municipality in the meantime, if it so desires, to expropriate the right or easement which I think exists.

Appeal allowed (MIDDLETON, J., dissenting).

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[APPELLATE DIVISION.]

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LOWRY v. ROBINS.

Contract—Breach of Promise of Marriage—Evidence of Promise—Corroboration—Evidence Act, sec. 11—Findings of Jury—Sanity of Plaintiff—Mental Unfitness for Marriage—Defence to Action—Appeal—Objection to Charge not Made at Trial and not Taken in Notice of Appeal—Rule 493—Discretion of Court—Defence not Passed upon by Jury.

At the trial of an action for breach of promise of marriage the jury, in answer to questions, found: (1) that the defendant promised to marry the plaintiff; (2) that he broke that promise; (3) damages, \$10,000; (4) that the plaintiff was sane at the time the promise was made; (5) and at the time when it should have been fulfilled. The trial Judge directed that judgment be entered for the plaintiff for \$10,000, and the defendant appealed:—

Held, that, although the evidence as to the promise was contradictory, there was evidence which, if believed, warranted the finding that the promise was made, and it could not be said that the finding was one which no reasonable jury could make.

(2) That there was sufficient corroboration in the testimony of the plaintiff's father and mother, as well as in the admitted acts and conduct of the defendant, to satisfy the Evidence Act, R.S.O. 1914, ch. 76, sec. 11.

The plaintiff laid the promise in August, 1915, and the breach in August, 1917. The defendant, besides denying the promise, pleaded "that the plaintiff now is and subsequent to the month of August, 1915, became mentally unfit to marry, and that such unfitness existed in the month of January, 1917, and has ever since continued." It was argued for the defendant before the appellate Court that the jury were misdirected or not directed on the question of the alleged mental condition of the plaintiff and the issue raised as to that condition rendering her unfit to marry. This objection was not taken in the notice of appeal:—

Held, per MEREDITH, C.J.O., that the objection was not open to the appellant (the defendant).

Per HODGINS, J.A.:—The objection was open, in the discretion of the Court, notwithstanding the omission to take it in the notice. Rule 493 should not be strictly enforced in a case where the objection not taken in the notice may be considered without unfairness to the opposite party. But effect could not be given to the contention that there was such a mental unfitness, not necessarily insanity, as justified the defendant in refusing to marry the plaintiff. At the trial mental unfitness was treated as equivalent to insanity; the jury were not asked to consider whether the evidence disclosed the kind of mental unfitness that was now urged as a defence; and there was, therefore, no proper foundation for a decision of the question whether mental unfitness, in the sense now urged, was a good defence.

Per FERGUSON, J.A.:—The trial Judge was not asked to leave to the jury a question with regard to the contention now made, and the Judge's charge was not objected to before him on the ground that he had failed to bring that contention to the attention of the jury; the contention now made was an afterthought which could not and should not be given effect to in an appellate Court either as a matter of right or a matter of grace.

THE following statement of the facts is taken from the judgment of MEREDITH, C.J.O.:—

This is an appeal by the defendant from the judgment dated the 4th June, 1918, which was directed to be entered by the Chief Justice of the Common Pleas, on the findings of the jury at the trial, which took place on that and the previous day.

The action is for breach of promise of marriage, and the appellant, besides denying the promise, pleads that the respondent, at the time of his pleading, was, "and subsequent to the month of August, 1915," in which month the promise is alleged to have been made, "became, mentally unfit to marry, and that such unfitness existed in the month of January, 1917, and has ever since continued."

Particulars of the alleged unfitness of the respondent were delivered, and they are that:—

"In or about the month of January, 1917, the plaintiff exhibited symptoms of insanity, and became violent and unmanageable, and escaped from her home in a nude state, and for a time was detained in a hospital for the treatment of mental diseases, and then was, and now is and has ever since continued, mentally unsound and unfit for marriage."

Questions were submitted to the jury. The questions and the answers to them are as follows:—

Q. Did the defendant promise to marry the plaintiff? A. Yes.

Q. If so, did he break that promise? A. Yes.

Q. And, if so, what sum of money is reasonable compensation to the plaintiff, under all the circumstances of the case, for the

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injuries sustained by her through that breach of that promise?
A. \$10,000.

Q. If the promise were made and broken, was the plaintiff sane at the time when it was made? A. Yes.

Q. And was she sane at the time when it should have been fulfilled? A. Yes.

The grounds stated in the notice of appeal are:—

1. That the learned Judge misdirected the jury in, among other things: (a) stating that the defendant was a marrying man and could not remain single; (b) stating that the ultimate result of the acquaintanceship between the plaintiff would be either seduction or marriage; (c) stating that the defendant was infatuated by the beauty of the plaintiff; (d) stating the law as to corroboration of the promise of marriage.

2. That the finding of the jury was contrary to the evidence and against the weight of evidence.

November 7, 8, and 11, 1918. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

I. F. Hellmuth, K.C., for the appellant. There was no evidence on which the verdict of the jury could reasonably be based. The verdict was perverse, and the appellant is entitled, at least, to a new trial. Even if the plaintiff's testimony as to the alleged promise to marry is believed, there is no sufficient corroboration of the promise, under the Evidence Act, sec. 11, to entitle her to recover. The charge to the jury was in some respects not warranted by the evidence, and the case as a whole was not fairly presented to them. In some particulars there was misdirection, and there was also a failure to direct the jury as to some important matters. The plaintiff states that the promise was made in August, 1915, but she cannot fix the day. Is it likely that she would fail to remember a day that was so important to her? The occasion, however, on which the alleged promise was made is clearly marked by certain circumstances which shew that the plaintiff was labouring under a delusion when she stated that the promise was made after she dined with the defendant and his mother at the defendant's house. She says that the defendant took her home in his car. She is contradicted on this point, not only by the defendant,

but also by his mother, another witness, and the chauffeur who took her home in the car. [MEREDITH, C.J.O.:—The jury were entitled to believe the plaintiff's testimony.] The evidence shews that the plaintiff was not a normal woman. She was subject to delusions. As a matter of fact, the defendant was amusing himself and had no idea of marrying. [MAGEE, J.A.:—Then he ought to pay for his amusement!] The evidence clearly shews that at this time and afterwards the plaintiff was subject to strong delusions on various matters. As to the alleged lack of corroboration, reference was made to *Cleeland v. McCune* (1908), 42 Ir. L.T.R. 201, as being a case where the verdict was set aside although the evidence in corroboration was much stronger than in the case at bar. It is worthy of remark that no letters passed between the parties. There were no presents, and no engagement ring. As to the charge to the jury, it is submitted that the general attitude of the learned Chief Justice who tried the case was one of hostility to the defendant, a fact which tended to prevent him from presenting the defendant's case as it should have been. In this connection reference was made to the remarks made by the learned Chief Justice in *Ogilvie Flour Mills Co. Limited v. Morrow Cereal Co.* (1917), 41 O.L.R. 58, at p. 77, 39 D.L.R. 463, on questions involving the credibility, and, especially, the demeanour, of witnesses.

W. N. Tilley, K.C., on the same side, argued that the learned trial Judge had misdirected the jury as to the mental condition of the plaintiff—he had, at all events, failed to make an adequate presentation of the defendant's position in that respect. It was sufficient to shew that the plaintiff was affected by a mental condition which unfitted her for married life. This is not the same thing as insanity, according to the doctors, but rather what is called *dementia præcox*. It is pleaded as an absolute defence, and also as a matter which might have been considered by the jury in mitigation of damages, if it had been properly presented to them. [Counsel for the plaintiff took the objection that this view of the case had not been previously presented to the Court]. This ground of defence can be taken here, whether previously presented or not. Willingness and capacity to transact business are not sufficient tests of mental fitness to marry. He referred to *Leeds v. Cook* (1803), 4 Esp. 256, 258; *Baddeley v. Mortlock* (1816),

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1 Holt 151; *Atchinson v. Baker* (1797), 2 Peake N.P. 103, at p. 104 *ad fin.*; *Hall v. Wright* (1858), E. B. & E. 746, 765, which was considered in *Liddell v. Easton's Trustees*, [1907] S.C. 154; *Baker v. Cartwright* (1861), 10 C.B.N.S. 124; *Jefferson v. Paskell*, [1916] 1 K.B. 57, *per* Phillimore, L.J., at p. 70. [MAGEE, J.A., referred to *Beachey v. Brown* (1860), E.B. & E. 796, a later case than *Hall v. Wright*, *supra*.] The trouble from which the plaintiff suffered is one that is likely to continue long, and is always liable to recur.

D. L. McCarthy, K.C., and *T. L. Monahan*, for the respondent, the plaintiff. The case has been complicated through the defendant adding a plea of insanity, by means of which an attempt is made to diminish the credit to be given to the plaintiff's testimony. The counsel who led for the defendant contended that his client made no promise at all, relying on the testimony of the three witnesses who contradict the plaintiff. But it is for the jury to believe whom they please, and there is no case where a verdict has been upset on such a ground as is here suggested. It is a good direction to a jury, that witnesses "are not to be numbered, but weighed:" *per* Moss, C.J.O., in *Tidy v. Toronto R. W. Co.* (1908), 12 O.W.R. 994, 995. There is strong corroborative evidence in the testimony of the plaintiff's father and mother. They referred to *Costello v. Hunter* (1886), 12 O.R. 333, *per* O'Connor, J., at p. 335; *Yarwood v. Hart* (1888), 16 O.R. 23; *Parker v. Parker* (1881), 32 U.C.C.P. 113, at p. 125, *et seq.*, where the cases on corroborative evidence under the statute are collected by Armour, J. That case was approved in *Radford v. Macdonald* (1891), 18 A.R. 167. As to the alleged error of the charge on grounds of misdirection and nondirection, they referred to the *Jefferson* case, *supra*, *per* Pickford, L.J., at pp. 73, 74. The alleged insanity of the plaintiff was not the cause of the breaking of the defendant's promise. The cases cited on the defendant's behalf, with the exception of the *Jefferson* case, are found in Halsbury's Laws of England, vol. 16, pp. 275, 276, and are all distinguishable from the case at bar.

Hellmuth, in reply, in referring to the *Costello* case, *supra*, called attention to the varying views expressed by the Judges, and in particular to the dissenting opinion of Galt, J., as to the corroboration. The corroborative evidence relied on must be corroborative in respect of the promise. He again referred to the *Cleeland* case, *supra*.

January 27, 1919. MEREDITH, C.J.O. (after stating the facts as above):—Upon the argument before us, it was contended that the jury were misdirected on the question of the alleged mental condition of the respondent, and the issue raised as to that condition rendering her unfit to marry.

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This objection is not taken in the notice of appeal, and was therefore, I think, not open to the appellant.

Although the evidence as to the promise was contradictory, there was evidence which, if believed, warranted the jury's finding that the promise was made as the respondent alleges, and we cannot interfere with that finding unless we can say that it is one that no reasonable jury could make, and that I am not prepared to do.

There was also, I think, sufficient corroboration to satisfy the Evidence Act, R.S.O. 1914, ch. 76, sec. 11, which provides that:—

“The plaintiff in an action for breach of promise of marriage shall not recover unless his or her testimony is corroborated by some other material evidence in support of the promise.”

The requisite corroboration is found in the testimony of the respondent's mother, on pp. 49 and 50 of the notes of evidence, and in the evidence of her father at pp. 56 and 57, as well as in the admitted acts and conduct of the appellant himself.

The other objections to the charge mentioned in the notice of appeal were not advanced by counsel upon the argument before us, and it is unnecessary to say more as to them.

I would dismiss the appeal with costs.

HODGINS, J.A.:—I do not know that the jury might not well have answered all the questions in favour of the appellant. But there was conflicting evidence, and the jury in such a case as the present is usually and properly supreme.

On the argument before us, the objections to the language used in the charge set out in the notice of appeal were not pressed, although strongly urged at the trial.

Instead, the Court listened for two days to a point which it is now discovered is not the subject of appeal at all, so far as the grounds are disclosed in the notice of appeal.

But I am far from being willing to hold that that omission in itself justifies the Court in refusing to hear and determine the

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question so raised. I think its consideration is entirely in the discretion of the Court, upon proper terms. A strict application of Rule 493* has never in my experience been made, except where it would have been unfair to the opposite party to relax it. Here no objection was taken, and both sides argued the point in question with as much vigour as if it had a legitimate foundation.

But there is a reason for refusing to give effect to the contention which, I think, is much more weighty. That contention was that there was such a mental unfitness, not necessarily insanity, as justified the appellant in refusing to marry the respondent.

This is pleaded in this form; "that the plaintiff now is and subsequent to the month of August, 1915, became mentally unfit to marry, and that such unfitness existed in the month of January, 1917, and has ever since continued." The writ was issued on the 14th September, 1917, the promise is laid in the month of August, 1915, and the breach on the 16th August, 1917.

It will be observed that the plea alleges *mental unfitness* accruing after the date of the promise as alleged. Now, at the trial mental unfitness was by the learned trial Judge and both counsel treated as equivalent to insanity, either evident or latent but still existent. The expression is capable of that meaning, though it might include various degrees of mental incapacity, and indeed extend to many conditions far removed from actual insanity.

The view taken during the trial was probably correct in a legal sense, for the law still lacks any clear definition of mental unfitness in relation to marriage. Indeed, regarding physical disease as a defence to an action for breach of promise, its lack of precision indicates that eugenics have not yet had their innings.

The evidence, instead of establishing insanity as understood in legal definition, resolved itself into proof of one mental aberration of a kind which might recur under the strain of child-birth or result in a nervous condition which, if transmitted, would produce a similar strain in the offspring.

That condition has not yet been pronounced to be a legal defence in an action for breaking a promise to marry, which probably accounts for the omission to set it up as a ground in the notice of appeal. It was not presented to the jury in the way

*493. Every notice of motion by way of appeal shall set out the grounds of the motion or appeal.

now argued, so far as is disclosed by the learned trial Judge's charge. Before disposing of it in this Court, it would be necessary to consider the exact scope of such a defence, and to lay down a precedent, probably a very valuable one, and then to decide whether the evidence brought the case within the precedent thus established. But this would be an invasion of the province of the jury, and upon a matter which, in this aspect, was never considered either by the presiding Judge or by them. In short we have neither the ruling of the trial Judge upon it nor any instruction to the jury directing them how to deal with it, and in consequence no proper foundation for a decision probably far-reaching in its consequences.

For these reasons, I am of the opinion that, having regard to the course taken at the trial, and to the considerations I have pointed out, we cannot give effect to the contentions so ably presented and so persuasively argued by counsel for the appellant.

I agree that sufficient corroboration in law was established.

The appeal should therefore be dismissed.

FERGUSON, J.A.:—Appeal by the defendant from a judgment of Meredith, C.J.C.P., dated the 4th June, 1918, whereby, on the findings of a jury, he directed judgment to be entered for the plaintiff for \$10,000 damages for breach of promise of marriage.

The defendant asks that the action be dismissed, or in the alternative for a new trial.

Mr. Hellmuth and Mr. Tilley did not limit their arguments to the reasons set forth in the notice of appeal filed and served.

Mr. Hellmuth submitted:—

1. That there was no evidence on which the jury could find a promise to marry.

2. There was not sufficient corroboration of the promise.

3. The charge of the trial Judge was not justified by evidence: there was misdirection and nondirection in that the case of the defendant was not sufficiently or adequately placed before the jury.

Mr. Tilley submitted that there had been a misdirection in that the learned trial Judge had failed to appreciate the full effect and meaning of the defendant's plea "that the plaintiff now is and subsequent to the month of August, 1915, became mentally unfit

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to marry, and that such unfitness existed in the month of January, 1917, and has ever since continued," and consequently neglected adequately and properly to instruct the jury on, or to ask them a material question in reference to, an issue raised by that plea.

Mr. Hellmuth's contentions are based on the weight of the evidence, the credibility of the witnesses, and the meaning and effect of their testimony, rather than on any doubtful legal question—and I shall deal with these first.

I have carefully considered his arguments along with the evidence; and, while there are many facts and circumstances that throw doubt upon the probability of the plaintiff's story of the alleged promise, the credibility of the witnesses and the weight to be attached to their evidence were questions for the jury, and we cannot interfere with their finding unless we can say either that there is no reasonable evidence to support it, or it is so much against the weight of evidence that reasonable men could not possibly make it. This, I think, no Court can say—I, at least, am not prepared to do so—nor do I think it can be successfully contended that there is not before the Court evidence which, if believed, furnishes sufficient corroboration of the promise sworn to by the plaintiff to satisfy the requirement of sec. 11 of the Evidence Act, R.S.O. 1914, ch. 76.

Sarah Lowry, mother of the plaintiff, at p. 39, testified:—

Q. What did he (the defendant) say? A. He said this to her, her father and myself. It was at our home. I said, 'Laura is a girl that always likes home.' He turned and patting her on the arm said, 'Well, Laura, I will always see that you will have a good home.' Her father heard that the same as I.

"Q. Was there any other occasion? A. Many."

Robert A. Lowry, father of the plaintiff, at p. 55, says:—

"I was sitting on the verandah when he drove up with his automobile. He came and sat with me. My daughter and Mrs. Lowry came out. During the conversation he brought it out that he had lots of cattle and he was shewing at the Exhibition. We got talking about one thing and another and Mrs. Lowry spoke of Laura being fond of her home. He turned to my daughter and said, 'I will see that you will always have a good home.' His remarks were addressed to my daughter, not to us at all. At that time he put his hand over on her knee.

“Q. Did you hear him say anything on any other occasion?
A. On the same evening he also spoke in regard to horses. He said his wife had been a splendid rider, and he would like Laura to be a good rider. Mrs. Lowry said she was exceedingly nervous with a horse. He said, ‘I will see that you will have a good quiet horse.’ That was the same evening.”

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If such statements were made to the plaintiff in the presence of her father and mother, both apparently respectable people, they cannot, I think, be taken to mean anything other than that the defendant was assuring the plaintiff and her parents that he would furnish the plaintiff with a good home because it was settled that she was to become his wife.

Before we can give effect to the contentions and argument presented by Mr. Tilley, we must, it seems to me, conclude:—

(1) That there is coupled with every contract to marry, the implied condition that both parties shall remain in the enjoyment of life and health, and that if, when the time arrives for the marriage ceremony, the condition of health of one of the parties is such that he or she is unfit for such a relationship and incapable of performing the duties incident thereto, or if it is reasonably certain that the inevitable result of the consummation of marriage would be the endangering of the life or health of one of the parties, a breach of the contract to marry is excusable.

(2) That the failure to instruct the jury on this theory of the defence contended for by Mr. Tilley, and to ask and obtain from them an answer to a question covering such an issue, was due to the misapprehension or neglect of the trial Judge and not to the election or neglect of the defendant and his counsel at the trial.

The able and instructive argument made in support of the proposition number (1) so engrossed the attention of the Court that the second and to my mind equally important proposition was not on the argument as fully discussed and considered as it should have been.

If the first proposition was at the trial relied upon as constituting a defence to the action and was not put forward only as a plea in mitigation of damage, it is, I think, unbelievable that counsel would not have asked the trial Judge to submit a question covering the point: for it is obvious that no effect could be given to the contention unless and until the jury were not only fully

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instructed on the issue but were asked and had answered some such question as: "Was the plaintiff, at the time fixed for the consummation of the marriage, afflicted with a mental disease, the reasonably certain result of which must be that the plaintiff will yet become mentally unbalanced, so as to be unable to control her own actions or to understand the nature and effect of her own words and acts, and incapable of performing the duties and obligations incident to the relationship of matrimony, and was she for these reasons unfit to marry?"

Though the jury was instructed to consider the plaintiff's alleged mental disease and its probable result, as matters which might properly affect the amount of their verdict, they were not asked to answer a question such as I have suggested, and consequently this Court is not in a position to consider the points of law that would arise out of an affirmative answer.

If the failure to submit such a question to the jury or to direct the jury thereon can be rightfully said to be the result of the neglect or misapprehension of the trial Judge, the defendant might have good grounds for complaint: on the other hand, if the failure to submit and obtain the answer of the jury to such a question must be ascribed to the neglect or election of counsel at the trial, the defendant has, it seems to me, no right to come into the Court of Appeal and ask us to give him a new trial and another opportunity to have the question submitted to and passed upon by another jury. The practice is well settled, and is, I think, accurately and concisely stated by Lord Halsbury in *Nevill v. Fine Art and General Insurance Co.*, [1897] A.C. 68, in which case he said (p. 76):—

"Where you are complaining of nondirection of the Judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect."

It is clear that at the trial counsel neglected to ask the trial Judge to leave such a question to the jury, and I am convinced that at that time he did not contend that proof of a mental condi-

tion short of an inability on the part of the plaintiff to comprehend and understand the nature and effect of her words and actions would furnish a defence to the action.

At the trial the defendant sought to establish that the plaintiff was then the victim of delusions and unable fully to appreciate the nature and import of her statements, and was insane. That issue was left to the jury and found in the plaintiff's favour. The defendant also gave evidence to shew that the plaintiff was suffering from a mental disease, and that, even though it had not developed so as to render her insane, the ultimate and probable result of her marrying would be that this disease would so affect her mental capacity that she would become incapable of performing her matrimonial duties; and this evidence was, at the defendant's request, submitted to the jury on the question of damages. That the defendant or his counsel at the trial contended for what Mr. Tilley now argues, I can find no record, and such lack of record, coupled with the fact that the trial Judge was not requested to leave to the jury the question necessarily arising out of and incident to such a contention, and the absence of objection on this ground to the Judge's charge, either at the trial or in the subsequent notice of appeal, satisfies me that this contention is an afterthought which cannot and should not in this Court be given effect to either as a matter of right or as a matter of grace.

Had it been shewn that, through surprise, or even through mistake, neglect, or lack of astuteness of counsel, the defendant had been deprived of a meritorious defence, we could and in most cases no doubt would on proper terms grant relief, but where it appears, as it does in the case at bar, that the plea of mental unfitness and insanity was not, at the time the breach occurred, or for that matter till the action was ripe for trial, put forward as an excuse, but was even then an afterthought, for the introduction of which by amendment to his defence the defendant sought and obtained the indulgence of the Court, it cannot, I think, be said to be one of those meritorious defences which the defendant ought to have another opportunity to litigate.

The conclusion I have just stated renders it unnecessary for me to express an opinion on the important and difficult questions of law raised by Mr. Tilley's contention and in support of which

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he cited English and American authorities, most if not all of which, except *Jefferson v. Paskell*, [1916] 1 K.B. 57, are collected and reviewed in *Corpus Juris*, vol. 9, pp. 339 and 340.

I would, for these reasons, dismiss the appeal with costs.

MACLAREN and MAGEE, JJ.A., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

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Ontario Temperance Act—Magistrate's Conviction of Physician for Offence against sec. 51 (1)—Prescription for Intoxicating Liquor—"Actual Need"—Honest Belief of Physician—Evidence—Question for Magistrate—Anomalies in Act—Doubts as to Meaning of Provisions relating to Medical Practitioners—Quantity of Liquor which may be Prescribed.

The defendant, a practising physician, was convicted by a magistrate of an offence stated to be that he (the defendant), on a day named, did give to one O. an order or prescription, addressed to a licensed vendor of liquor, for one quart of whisky, the occasion not being a case of actual need, in violation of sec. 51, sub-sec. 1, of the Ontario Temperance Act, 6 Geo. V. ch. 50.

Section 51 (1) provides that a practising physician, who shall deem any intoxicating liquor necessary for the health of his patients, may give such patient or patients a prescription therefor, not exceeding six ounces, except in certain cases in which a quantity not exceeding one pint may be prescribed; "but no such prescription shall be given except in cases of actual need, and when in the judgment of such physician the use of liquor is necessary." Upon appeal from an order of ROSE, J., in Chambers, quashing the conviction:—

Held, that a physician who honestly believes that liquor is necessary for the health of his patient and prescribes it in accordance with the provisions of the Act cannot be said to be guilty of an offence against the Act because the patient did not in fact need liquor for his health.

But in this case—assuming that the defendant's honest belief that the occasion was one of actual need would justify him in giving the prescription—there was some evidence upon which the magistrate could find that the defendant did not honestly believe that O. was in actual need of the liquor; and the conviction could not be interfered with (MACLAREN and FERGUSON, JJ.A., dissenting).

The question whether the conviction could be supported on the ground that a larger quantity than is permitted by the Act was prescribed, was discussed but not decided.

Sections 51 and 128 (1) of the principal Act, sec. 18 of the amending Act 7 Geo. V. ch. 50, and sec. 12 of the amending Act 8 Geo. V. ch. 40, considered.

Suggestion that the Act should be amended so as to remove the anomalies in it and the doubts that exist as to the meaning of the provisions relating to medical practitioners.

Per MACLAREN and FERGUSON, JJ.A., in the appellate Court, and *per* ROSE, J., in Chambers:—There was no evidence before the magistrate that the case of O. was not one of actual need.

Semble, per FERGUSON, J.A., that, according to the true intent and meaning of the whole Act, the words, "no such prescription shall be given except in cases of actual need," were intended only as an expression of the definition the Legislature desired the physician to adopt as his guide in deciding whether intoxicating liquor is necessary for the health of his patient—with the result that the right of the Court to review the physician's conclusion on that question is limited to an inquiry as to the good faith of the physician. Order of Rose, J., reversed.

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MOTION by the defendant to quash a magistrate's conviction, under sec. 51 of the Ontario Temperance Act, 6 Geo. V. ch. 50, for prescribing whisky, "the occasion not being a case of actual need."

September 20, 1918. The motion was heard by ROSE, J., in Chambers.

R. T. Harding, for the defendant.

Edward Bayly, K.C., for the magistrate and complainant.

September 21. ROSE, J.:—A physician is authorised by sec. 51 to give a prescription for intoxicating liquor, if he deems it necessary for the health of his patient; "but no such prescription shall be given except in cases of actual need, and when in the judgment of such physician the use of liquor is necessary." What is alleged is that, whether or not the physician believed that the use of the prescribed liquor was necessary, as he swears he did, there was, in fact, no actual need of it, and, therefore, an offence was committed.

* I can find no evidence that it was not a case of actual need; and I think, therefore, that the conviction must be quashed. There will be an order for the protection of the magistrate.

The complainant appealed from the order of ROSE, J.

December 16, 1918. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

Edward Bayly, K.C., for the appellant, argued that the conviction should be supported because there was some evidence at the trial before the Police Magistrate which justified him in coming to the conclusion that the defendant had been guilty of an offence under sec. 51 of the Ontario Temperance Act. The defendant himself admitted that he thought his patient had been

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coming for liquor too often. *Rex v. Melvin* (1916), 38 O.L.R. 231, 34 D.L.R. 382, is not an authority which supports the quashing of the conviction in the case at bar.

H. H. Dewart, K.C., for the respondent, the defendant, argued that Rose, J., could not have given any other decision than he did upon the evidence, and the proper construction of the statute. The onus was upon the complainant to shew that it was not a case of actual need, and the onus had not been discharged. The *quantum* of liquor prescribed was not the point, and had nothing to do with the matter. [MEREDITH, C.J.O., did not agree with counsel's view on this point.] The true question is whether or not the defendant acted in good faith, and with a proper exercise of his judgment, in prescribing liquor for the use of his patient. The defendant was not on trial for an evasion of the Act. [MEREDITH, C.J.O., thought that the question was one of the power of the magistrate to make the conviction on the evidence that was before him. FERGUSON, J.A., referred to the fact that the defendant had not been charged with an evasion of the Act. MAGEE, J.A., said that two things were material in order to justify the defendant's action—the question of actual need on the part of the patient, and the *bonâ fide* exercise of the defendant's judgment.]

Bayly, in reply.

January 27, 1919. MEREDITH, C.J.O.:—This is an appeal by the complainant from an order of Rose, J., dated the 21st September, 1918, quashing a conviction of the respondent by the Police Magistrate at Stratford.

The conviction is dated the 3rd day of July, 1918, and the offence is stated to be that the respondent on the 25th day of June, A.D. 1918, at the city of Stratford, did give to one Robert Ovington an order or prescription, addressed to E. B. Smith, of the city of London, in the Province of Ontario, a licensed vendor of liquor, for one quart of whisky, the occasion not being a case of actual need, in violation of sec. 51, sub-sec. 1, of the Ontario Temperance Act, in such case made and provided.

My brother Rose was of opinion that there was no evidence "that it was not a case of actual need," and he therefore quashed the conviction.

The Ontario Temperance Act is an ill-drawn enactment, and it is difficult to understand what is meant by some of its provisions, and especially those which have to be considered in dealing with this appeal.

Section 51 is in form an enabling section, and it provides that "any physician who is lawfully and regularly engaged in the practice of his profession, and who shall deem any intoxicating liquors necessary for the health of his patients, may give such patient or patients a written or printed prescription therefor, addressed to a druggist, and not exceeding six ounces, except in the case of alcohol for bathing a patient or other necessary purpose, or liquor mixed with any other drug is required when a quantity not exceeding one pint may be prescribed."

This is all subject to the following qualification: "but no such prescription shall be given except in cases of actual need, and when in the judgment of such physician the use of liquor is necessary, or such physician may administer the liquor himself, and for that purpose may have one quart in his possession when visiting his patients."

Then follows the penalty provision, which is: "And every physician who shall give such prescription or administer such liquor in evasion or violation of this Act or who shall give to or write for any person a prescription for or including intoxicating liquor for the purpose of enabling or assisting any person to evade any of the provisions of this Act, or for the purpose of enabling or assisting any person to obtain liquor for use as a beverage, or to be sold or disposed of in any manner in violation of the provisions of this Act, shall be guilty of an offence under this Act."

If that were all that is provided, it would be quite clear that the giving of a prescription for a quart of whisky would be a violation of the Act, but it is said that such a prescription is authorised by subsequent provisions of the Act.

One of these provisions is that contained in clause (a) of subsec. 1 of sec. 51. It provides that:—

"Upon the prescription of a duly qualified medical practitioner a vendor under this Act may sell and supply for strictly medicinal purposes—

"(1) Ale, beer, and porter in quantities not exceeding one dozen bottles, containing not more than three half pints each at any one time;

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"(2) Wines and distilled liquor not exceeding one quart at any one time."

I find nowhere in the Act any express authority conferred upon a physician to give a prescription for these quantities; in my opinion, this provision impliedly authorises him to do so; but, unless there is something in the Act which modifies the express provision of sub-sec. 1, limiting the quantity that may be prescribed for a patient, I am unable to read the provision I have just quoted as authorising a prescription to be given to a patient for the larger quantities.

It is said, however, that this authority is conferred by a provision which immediately follows, which reads:—

"All the provisions of this Act applicable to prescriptions addressed to and the sale of liquor by druggists, save as to quantity, shall apply to prescriptions addressed to and the sale of liquor by a vendor under this Act."

The provisions as to druggists are contained in secs. 123 to 134, both inclusive. Section 128 (1) provides that:—

"Nothing in this Act shall prevent a druggist from keeping liquor for sale for strictly medicinal purposes, or from selling liquor for strictly medicinal purposes in packages of not more than six ounces at any one time, or from selling for strictly medicinal purposes any mixture containing liquors mixed with any other drug or medicine in packages of not more than one pint at any one time, or from selling alcohol not exceeding one pint for bathing a patient or for other necessary purposes, but in every such case only under a *bonâ fide* prescription of such alcohol, liquor or mixture duly signed by a legally qualified medical practitioner, nor from selling to such practitioner upon his written order one quart of liquor for use in the practice of his profession"

I am unable to understand how the provisions of the last part of sub-sec. 1 of sec. 51, which I have quoted, can be given the effect of enabling a physician to prescribe for a patient a greater quantity of intoxicating liquor than that mentioned in the first part of the sub-section.

The purpose of this last part of sub-sec. 1 was to provide for sales by liquor vendors: thus far no provision as to them had been made except that contained in clause (a), and the method of

making it was to apply the provisions as to druggists, save as to quantity. The effect of this was to make such of the provisions as to druggists as could be applied to vendors applicable to them, except those limiting quantities, and to enable them to supply liquors under the conditions which are applicable to sales by druggists.

A druggist may, no doubt, under the authority of sec. 128 (1), sell to a legally qualified medical practitioner on his written order one quart of liquor for use in his profession, but he may not sell that quantity, on a prescription, to any one but such a practitioner.

If I am right as to this, the effect of the Act is to permit a vendor to sell to a duly qualified medical practitioner, upon his written order, the quantities of liquor mentioned in clause (a), but not to authorise a medical practitioner to prescribe for a patient or a vendor to sell to the patient a greater quantity than that mentioned in the first sub-section of sec. 51.

There is an apparent contradiction between sub-sec. 1 and clause (a): if the latter means that a medical practitioner may obtain for use in his profession the quantities of liquor mentioned in the clause, and sub-sec. 1 enables him to have in his possession, when visiting his patients only one quart, it may be that there is no real inconsistency: the one deals with the carrying about of liquor when visiting patients, and the other may have been intended to apply to liquor to be kept by the medical practitioner in his private dwelling house or in his office or dispensary. By an amendment made by 8 Geo. V. ch. 40, sec. 12, a duly qualified medical practitioner actually engaged in the practice of his profession is authorised to have in his possession ten gallons of liquor, and is permitted to keep it in his private dwelling house or in his office or dispensary, but as to how or where the liquor is to be got the Act is silent.

It is to be noticed that by 7 Geo. V. ch. 50, sec. 18, a form for the prescription provided for by sec. 51 (1) is prescribed, and that the notes to the form as to the quantities to be prescribed state them as they are mentioned in sec. 51 (1), which indicates, I think, that it was intended that a prescription for a patient should be limited to those quantities.

I have dealt with the question I have discussed mainly in the hope that the attention of the Legislature may be called to the

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necessity of amending the Act so as to remove the anomalies in it and the doubts that exist as to the meaning of the provisions relating to medical practitioners, especially as I have been given to understand that it has been assumed that a medical practitioner may prescribe for a patient the quantities of liquor mentioned in clause (a).

I come now to the question raised by the appeal.

It is argued that, the offence of which the respondent was convicted being that he prescribed the quart of whisky for Ovington, "the occasion not being one of actual need," the case must be considered in that aspect only, i.e., whether there was any evidence that there was no actual need, and that the conviction cannot stand if that question be answered in the negative, even though the prescribing of a quart of whisky was in itself an offence against the Act.

The main question of law discussed on the argument was as to the meaning of the words "but no such prescription shall be given except in cases of actual need."

It was argued by the appellant's counsel that the question is not, was there in the honest judgment of the physician need? but is, was there in fact actual need? It is difficult to understand the coupling of the necessity for actual need with the words which follow, "and when in the judgment of such physician the use of liquor is necessary," and with the opening words of subsec. 1, which authorise a medical practitioner, "who shall deem any intoxicating liquors necessary for the health of his patients," to "give such patient or patients a written or printed prescription therefor."

It is difficult to understand why the enactment was framed in the form in which it is drawn, and it seems strange that a physician should be authorised to prescribe liquor for a patient when in his judgment the use of liquor is necessary, and that at the same time he should be put in the position that, if there is in fact no need for prescribing liquor, he commits an offence against the Act. I have endeavoured to find some meaning for the words as to actual need which would not put a physician in that unfortunate position, and the only suggestion that has come to my mind is that the words were intended to apply to a case where the use of liquor was necessary for the patient, but he had no need of getting

it because he had at the time in his possession all that he needed. The suggestion is not a very satisfactory one; but, as I have said, it is the only one which has occurred to me. It may be that this is another instance of the ways of a Legislature being past finding out.

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However that may be, I am not prepared to decide that a physician who honestly believes that liquor is necessary for the health of his patient and prescribes it in accordance with the provisions of the Act is guilty of an offence against the Act because the patient did not in fact need liquor for his health. A physician must necessarily depend very much upon what his patient tells him as to his condition and symptoms, and it would be an intolerable state of things if a physician, who had no reason to disbelieve what his patient had told him, and had formed the honest opinion that liquor was necessary for the health of the patient, and had prescribed it, must be adjudged guilty of an offence against the Act if it were shewn that he had been imposed upon by a false statement of his patient as to his condition and symptoms.

It is argued, however, that the respondent's own testimony before the Police Magistrate shews that he did not believe that Ovington was in actual need of the liquor which he prescribed, and the following excerpt from his testimony is relied on in support of the argument:—

“May 9, he (Ovington) had indigestion.

“June 13, he had nervousness.

“June 14, he had nervousness.

“I prescribed six ounces on June 13 and 14.

“On June 15, I remembered prescriptions of June 13 and 14. I refused him on that account on June 15; I thought he was coming too frequently. I knew he had six ounces a day for the two preceding days. I didn't think he should have another. When he said a quart would last a long time and would save bother, I gave him an order for a quart; he needed it. I told him to take one or two ounces, and he faithfully declared he would take medically and it would last him for months. I took his word for it. On my own judgment as a medical man I would have given him an order for a quart. I was depending on his word to take it as ordered or I wouldn't have given him the prescription. I was complying with law.”

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I confess that I am quite unable to understand the theory upon which the respondent came to the conclusion that Ovington needed the quart of whisky for which he gave him a prescription, and the respondent does not throw any light upon the subject.

He was dealing with a man who, upon his own shewing, was coming to him too often, and he refused to give him a prescription—as I understand a prescription for six ounces—on that account, and yet he gave to that man a prescription for a quart of whisky, trusting him to take it in the quantities in which he was directed to take it. In view of this evidence, I cannot say that there was no evidence upon which it was open to the Police Magistrate to find, as he has found, that there was no actual need for the liquor that was prescribed by the respondent.

I assume for the purpose of my decision that it would suffice to justify the respondent that he honestly believed that the occasion was one of actual need.

It is unnecessary to say whether, upon that evidence, I should have reached the conclusion to which the Police Magistrate came. If there was any evidence warranting his conclusion, it cannot be disturbed; and, in my judgment, there was.

I have assumed without deciding that the conviction cannot be supported on the ground that a larger quantity than is permitted was prescribed, if that were all that was done in contravention of the Act.

I would allow the appeal, reverse the judgment of my brother Rose, and substitute for it judgment dismissing the motion to quash, and I would leave each party to bear his own costs of the motion and of the appeal.

HODGINS, J.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A.:—In this case I would not, upon the evidence as one reads it, have reached the conclusion which the Police Magistrate was able to arrive at, that a reputable physician was guilty of a breach of the Act in giving a prescription for liquor to a patient who had consulted him so seldom. It is true the prescription was for a quart, but it was to be filled by an authorised vendor, who was in a city 30 miles away, and on the ground of being less expensive than a succession of six-ounce prescriptions

to be filled by a local druggist, and with the expressed intention that it would suffice for some months. On the assumption that the statute impliedly authorises, as I think it does, a prescription to such a vendor for a quart, it is not the less a prescription than if it were addressed to a druggist for the smaller quantity, and it is not to be more readily presumed that the whole quantity prescribed was to be taken or administered in other than proper doses. If the prescription was lawful in quantity, the Legislature must have intended that physicians shall use their honest judgment as to the character of the patients whom they would entrust with a larger number of doses of what they consider a proper remedy. But my difficulty is that I cannot say there was not some evidence before the Police Magistrate upon which, if he chose to attach weight to it and less weight to other evidence, he could fairly make the finding which he did. If there is any evidence to sustain a conviction, his is the tribunal in which it is to be weighed, and he has the advantage of seeing the persons by whom and the manner in which it is given—and his judgment upon it cannot be disturbed on such an application. Therefore, reluctantly, I feel bound to agree that the appeal should be allowed.

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FERGUSON, J.A.:—It is to be noticed that the defendant was not, as he might have been, prosecuted for prescribing more liquor than was necessary or with evasion of the Act, or for assisting another person to evade the Act, or for enabling any person to obtain liquor for use as a beverage or to be sold, etc., all of which are made offences by sec. 51 of the Act. Therefore we must, I think, consider the evidence on the assumption that none of these offences has been committed, and consequently on the assumption that the defendant actually and in good faith deemed intoxicating liquor necessary for the health of his patient Ovington, and then ascertain if there is any evidence to justify the magistrate in saying that the defendant had arrived at an erroneous conclusion and there was, in fact, no actual need of Ovington having liquor as a medicine.

The argument of counsel for the appellant was founded largely on a statement of the defendant found at p. 13 of the evidence.

[The learned Judge made the same quotation from the testimony of the defendant as made by the Chief Justice, *supra*.]

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Had the defendant been prosecuted for assisting Ovington to procure liquor as a beverage, or for any other of the offences in which intent or good faith is a factor, the statement I have quoted might have been taken as furnishing some evidence to justify an inference of lack of such good faith, but where, as, here, good faith must be assumed, I fail to see anything in this statement which furnishes evidence that Ovington's state of health was such that he was not in actual need of any liquor as a medicine—to my mind the amount of liquor prescribed, or the fact that Ovington had on the two previous days consumed more than he should have, are not factors in the offence as charged.

It was in the argument assumed that the Legislature intended and enacted that a Court might review the *bonâ fide* opinion of a physician; but I am not at all certain that it might not have been successfully urged that such is not the effect of the legislation, and that, according to the true intent and meaning of the whole Act, the words, "no such prescription shall be given except in cases of actual need," were intended only as an expression of the definition the Legislature desired the physician to adopt as his guide or standard in arriving at his conclusion on the question submitted to him for decision, "Is intoxicating liquor necessary for the health of his patient?" with the result that the right of the Court to review the physician's conclusion on that question is limited to an inquiry as to the good faith of the physician.

The point was not raised or argued, and, on the view I have taken of the evidence, it is not necessary to arrive at a conclusion on the question. I only mention it so that it may not hereafter be said that the point was necessarily dealt with and disposed of in the decision of this appeal.

I would dismiss the appeal.

MACLAREN, J.A., agreed with FERGUSON, J.A.

Appeal allowed (MACLAREN and FERGUSON, JJ.A., dissenting).

[APPELLATE DIVISION.]

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Principal and Agent—Authority of Agent to Sell Land—Authority to Obtain Offer of Purchase and Receive Deposit—Sale Falling through by Fault of Principal—Right of Purchaser to Recover Deposit—Action against both Principal and Agent—Repudiation of Agent by Principal—Uncertainty as to Person to be Sued—Recovery against Principal—Costs of Agent—Payment by Principal—Right of Agent to Commission—Deduction from Deposit—Agreement to Pay Commission—Necessity for Writing—Statute of Frauds, sec. 13 (6 Geo. V. ch. 24, sec. 19)—Judgment—Appeal—Costs.

The plaintiff, in June, 1918, made an offer to the defendant D., as agent for the defendant L., to purchase land of L. for \$5,000, and with the offer paid \$200 to D. as a deposit. In an action for the return of the \$200, the offer not having been accepted, the trial Judge found: that L., in May, 1917, gave D. written authority to sell for \$5,000, and that that authority was not expressly revoked; if revoked by lapse of time, it was revived in the spring or summer of 1918, when L. instructed D. to procure a purchaser for \$5,000; that L., when approached by the plaintiff, sent him to D. and told him to make an offer through D.; that D. procured from the plaintiff a written offer to purchase at \$5,000, paying part only in cash, and that offer was refused by L.; that D. obtained from the plaintiff a second offer to pay all cash, and this L. also refused:—

Held, upon appeal, adopting these findings, that D. had authority to receive an offer, and, as the making of a deposit was a part of that offer, being in the nature of an earnest and guarantee for fulfilment, D. was not going beyond his authority in receiving it.

Hall v. Burnell, [1911] 2 Ch. 551, and *International Sponge Importers Limited v. Andrew Watt & Sons*, [1911] A.C. 279, applied and followed.

The plaintiff was entitled to recover his deposit; and he was justified in suing both principal and agent, for L. had expressly repudiated D.'s right to receive the money, and the plaintiff might well be in doubt as to his rights.

As between L. and D., the latter was entitled to retain his commission out of the \$200; he had done what L. wished him to do, and she alone was to blame for the sale falling through.

D., not being obliged to sue for his commission, was not affected by sec. 13 of the Statute of Frauds, as enacted by 6 Geo. V. ch. 24, sec. 19: the contract to pay commission was a good agreement, though, if not in writing, unenforceable by the Court (sec. 13); the Court had not to enforce it, but to decide whether what was done with the deposit as between the defendants was justified.

Before action, D. had sent to L. a cheque for the amount of the deposit, less his commission, and L. had refused to receive it:—

Held, that the plaintiff was entitled to judgment against L. for the \$200 and costs of the action; that L. was entitled to judgment against D. for the \$200, less commission; that D.'s costs of the action should be paid, not by the plaintiff, but by L.; and that L.'s appeal from the judgment should be dismissed with costs.

Judgment of the County Court of the County of York affirmed.

AN appeal by the defendant Mary Legree from the judgment of DENTON, Jun. Co.C.J., in an action in the County Court of the County of York.

The statement of claim was (in part) as follows:—

2. On or about the 4th June, 1918, the plaintiff, through Dodds Limited, as authorised agents for the defendant Mary Legree,

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signed an offer to purchase, from the said defendant Mary Legree, premises known as No. 653 Bloor street west, in the city of Toronto, for the sum of \$5,000, and gave to the said agents his cheque for \$200 as a deposit.

3. On the signing of the said offer to purchase, the plaintiff arranged a mortgage of \$2,500, and incurred thereby agent's commission for placing of the said mortgage, solicitor's fees, and other costs in connection therewith.

4. After the deposit of \$200 had been paid as aforesaid, and arrangements completed as set out in paragraph 3 herein, the defendant Mary Legree refused to accept the plaintiff's offer.

5. The plaintiff, through his solicitor, has demanded from both the defendant Mary Legree and her agents, Dodds Limited, the return of the said deposit of \$200, but they have refused to return the same.

6. That, on account of the refusal of the defendant Mary Legree to accept the said offer, the plaintiff has been unable to find another suitable house, and has incurred costs as set out in paragraph 3 herein, and other expenses and costs.

The plaintiff therefore claims:—

- (a) The return of his deposit of \$200.
- (b) \$100 damages.
- (c) His costs of this action.
- (d) Further and other relief.

The statement of defence of the defendant Mary Legree was (in part) as follows:—

2. The defendant Mary Legree did not authorise the defendants Dodds Limited to enter into any agreement with the plaintiff, nor did the defendant Mary Legree authorise Dodds Limited to receive any money on her behalf.

3. The defendant Mary Legree did not authorise the plaintiff to arrange a mortgage as set out in paragraph 3 of the statement of claim herein.

4. The defendant Mary Legree did not receive the deposit of \$200 from the plaintiff, nor did she receive any portion of the said \$200 from the plaintiff, nor did she receive any amount from the plaintiff.

5. The defendant Mary Legree did not give any undertaking to any person to accept the plaintiff's alleged offer, nor did the

defendant Mary Legree undertake to procure another house for the plaintiff.

The statement of defence of the defendants Dodds Limited was (in part) as follows:—

2. By instrument bearing date the 16th May, 1917, the defendants Dodds Limited were authorised by the defendant Mary Legree to sell the premises 653 Bloor street west, in the city of Toronto, for \$5,000; and, acting upon the said authority, the said defendants Dodds Limited, as agents for Mary Legree, sold the said premises to the plaintiff.

3. The defendants Dodds Limited received from the plaintiff \$200 by way of deposit on the said purchase, and immediately communicated to the defendant Mary Legree the fact that they had received the said deposit, and forwarded to her the sum of \$75, after having deducted their commission of 2½ per cent. upon the sale price as agreed.

4. The defendant Mary Legree returned to the defendants Dodds Limited their cheque for \$75 and refused to carry out or ratify the sale to the plaintiff.

The action was tried by DENTON, Jun. Co.C.J., without a jury; judgment was given against the defendant Legree for \$200 and in favour of Legree against Dodds Limited for \$75—the difference, \$125, being the amount of commission for which the trial Judge considered the defendant Legree liable to Dodds Limited; the defendant Legree was also ordered to pay the costs of her co-defendant.


The reasons for judgment of the learned Junior County Court Judge were as follows:—

I find upon the evidence that the written authority which Mrs. Legree gave to Dodds Limited on the 16th May, 1917, to sell the house for \$5,000, was not expressly revoked either in writing or verbally. If it can be said to have been revoked by lapse of time, then I find that it was revived or renewed in the spring or summer of 1918, when, I also find upon the evidence, Mrs. Legree instructed and authorised Dodds Limited to procure a purchaser for this property at \$5,000; that she authorised Dodds Limited to procure the offer from Silverman at that figure.

I also find upon the evidence that Mrs. Legree verbally agreed with Silverman to sell to him at that figure, and I also find that

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Mrs. Legree told Silverman to pay the deposit to Dodds Limited.

Dodds Limited did procure an offer from Silverman at \$5,000, the first offer being part cash only, and that offer she refused, on the ground that she wanted all cash.

Then, I find, a second offer was obtained from Silverman to pay all cash, and she refused this also, notwithstanding her authority to Dodds Limited to obtain a purchaser at that figure and her verbal agreement with Silverman to sell at that sum.

On this statement of the facts, it seems to me that the plaintiff is entitled to recover from Mrs. Legree the \$200 he paid to her agents as a deposit. He is entitled to recover on two grounds: first, that she authorised Silverman to pay the money to Dodds Limited as a deposit on an offer which she subsequently refused to accept; and on the further ground that she did authorise Dodds Limited to obtain a purchaser at that figure, and Dodds Limited, I think, were her agents for the purpose of receiving that money.

There will be judgment for the plaintiff against Mrs. Legree for \$200 and the plaintiff's costs of the action.

As between Legree and Dodds Limited, I think the latter earned their commission, and are entitled to it, and that Mrs. Legree should pay their costs of defending this action.

The result then is: judgment against Dodds Limited for \$200, less the \$125, their commission, which they are entitled to keep. The defendant Legree must pay the costs of the co-defendants, which I fix at \$40.

December 19, 1918. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. T. Loftus, for the appellant, argued that the authority given by his client to the agents did not confer upon the latter authority to obtain an offer or to receive the deposit. He referred to *Bergman v. Cook* (1912), 5 D.L.R. 233, 22 Man. R. 435; *Bowstead on Agency*, 5th ed., p. 79, and case there cited of *Mynn v. Joliffe* (1834), 1 M. & R. 326, 42 R. R. 802. The claim to a commission is defeated by sec. 13 of the Statute of Frauds, R.S.O. 1914, ch. 102, added by 6 Geo. V. ch. 24, sec. 19. He referred also to *Bowstead, op. cit.*, pp. 159, 163.

T. H. Barton, for the defendants Dodds Limited, respondents, and *D. W. Markham*, for the plaintiff, respondent, relied upon the findings of fact and the conclusions of the learned trial Judge.

January 27, 1919. The judgment of the Court was read by HODGINS, J.A.:—Appeal by the defendant Legree from the judgment of Denton, Jun. Co.C.J., in an action to recover a deposit of \$200 paid to the defendants Dodds Limited on the delivery of an offer for a house, the property of the defendant Legree.

The learned trial Judge gave judgment against the appellant for \$200 and also in favour of Legree against Dodds Limited for \$75—the difference being the amount of commission for which he considered the appellant liable to Dodds Limited; Legree was also ordered to pay the costs of her co-defendants.

The findings of fact of the learned trial Judge are borne out by the testimony given by the appellant and the respondents. There was authority in writing to sell, and it was never revoked but treated as subsisting when the appellant sent the respondent Silverman to the agents. But, in addition to that, when the respondent Silverman first approached the appellant and discussed the price, he was expressly sent by her to the agents and directed to make this offer through them and to deal with them. I think this does away with the point raised that authority to sell does not confer authority to obtain an offer. The respondents Dodds Limited had both, and were, in my view, entitled to receive the deposit. There was authority to receive an offer, and, as the making of the deposit was a part of that offer, in the sense that a deposit is in the nature of an earnest and guarantee for fulfilment of the offer (*Hall v. Burnell*, [1911] 2 Ch. 551), the agents were not going beyond their authority in receiving it. And where there is authority to receive a payment by cheque, express notice that it must be a crossed cheque in favour of the principal is necessary in order to invalidate, as against the principal, payments made by cheque in favour of the agents: *International Sponge Importers Limited v. Andrew Watt & Sons*, [1911] A.C. 279.

There can be no doubt that the agents earned the commission. Having authority to sell, and being directed by the appellant to receive an offer from the respondent Silverman, they procured two offers for \$5,000, upon terms which, at the respective times they were procured, represented in each case those terms which the appellant had previously verbally agreed to. She refused to accept these offers, the first because she insisted on all cash, the last because she wanted more money. But her two refusals were

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due to afterthoughts; the agents had done what she wanted them to do, and she alone is to blame for the sale falling through.

In such circumstances, the respondent is clearly entitled to his deposit back. The agents received it for and on account of their client, and as against the respondent the agents could not hold it. This would be so even if they were mere stakeholders. The money was not the property of the agents, and, if sued alone, they would have had no defence. The general rule is that the principal and agent are not both liable, but the plaintiff may, when uncertain of his rights, sue both. He had paid the money to one acting as agent in a transaction which fell through, and the litigation itself indicates that he might well be in doubt, for the appellant expressly repudiates the agents' right to receive the money. It is not a case in which he should pay the agents' costs.

Is the appellant liable to pay her co-defendants' costs of defending the action? It seems that before action the respondents Dodds Limited had sent the appellant a cheque for the \$75, and she had refused to receive it; and, in view of the findings of the learned Judge and her pleadings, I think the order on her for these costs is justified: see *Williams v. Lister and Co.* (1913), 109 L.T.R. 699.

A question was raised on the argument as to the effect of 6 Geo. V. ch. 24, sec. 19,* which came into force on the 1st January, 1917. The original authority in writing is dated the 18th May, 1917.

If the respondents Dodds Limited were compelled to sue for their commission, they would probably meet with difficulty in recovering for anything done short of exact performance of their authority. But having, while fulfilling their duty as agents, whether under the writing or the subsequent verbal enlargement of its scope, come into possession of enough of their principal's money, they do not need to sue. They can set off against or appropriate to the earned commission enough to pay and satisfy it, and the statute does not apply to prevent it. The contract to

*This section amends the Statute of Frauds, R.S.O. 1914, ch. 102, by adding thereto the following as sec. 13:—

13.—(1) No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorised.

pay commission is a good agreement, though, if not in writing, unenforceable by the Court. Here the Court has not to enforce it, but to decide whether what has been done with the deposit as between the appellant and her agents is justified.

I agree with the disposition of the whole matter made by the learned trial Judge, and would dismiss the appeal.

I may add that the alteration in the offer relied on was made before it was issued, and by the respondent Silverman's own solicitors, and in no sense vitiated the document. The sending of the second offer, as late as the 13th June, though it had to be accepted by the 11th, is rendered quite unimportant by the fact that the appellant had previously declined to sign it. It was formally sent by the agents for their principal's information with the cheque for \$75.

The appeal should be dismissed.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

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ASHTON v. TOWN OF NEW LISKEARD.

Highway—Nonrepair—Snow and Ice on Sidewalk—Injury to Pedestrian—“Gross Negligence”—Municipal Act, sec. 460 (3).

Upon the sidewalk of the principal street in a town, in front of two vacant buildings, there was an accumulation, of considerable depth, of snow and ice all through the winter of 1916-17. A sloping ridge, from 8 to 12 inches high in the centre, was formed; and on the evening of the 23rd March, 1917, the surface was slippery after a thaw and drizzling rain, followed by freezing. An employee of the town corporation testified that he had put sand on the sidewalk on the day of the accident, but did not say that he had put any sand on the slope. The plaintiff slipped upon the slope, fell, and was injured:—

Held, that the defendants, the town corporation, were guilty of “gross negligence” within the meaning of sec. 460 (3) of the Municipal Act, and were liable to the plaintiff in damages for her injury.

The meaning of “gross negligence” discussed.

City of Kingston v. Drennan (1897), 27 Can. S.C.R. 46, followed.

Judgment of the District Court of the District of Temiskaming reversed.

AN appeal by the plaintiffs from the judgment of the Junior Judge of the District Court of the District of Temiskaming dismissing an action brought by a man and his wife against the

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Corporation of the Town of New Liskeard to recover damages for bodily injuries sustained by the wife by a fall on an icy sidewalk in the town, and consequent loss and expense to the husband.

September 25, 1918. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

A. G. *Slaght*, for the appellants, argued that the defendants had been guilty of "gross negligence," within the meaning of the Municipal Act, sec. 460 (3). He referred to *Edwards v. Town of North Bay* (1915), 8 O.W.N. 119, 22 D.L.R. 744; *Killeleagh v. City of Brantford* (1916), 38 O.L.R. 35, 32 D.L.R. 457. There is no evidence of contributory negligence on the part of the female plaintiff: *Gordon v. City of Belleville* (1887), 15 O.R. 26.

Peter White, K.C., for the respondents, the defendants, relied on the judgment of the learned trial Judge, and referred to *German v. City of Ottawa* (1917), 56 Can. S.C.R. 80, 39 D.L.R. 669, affirming the judgment of the Appellate Division, 39 O.L.R. 176, 34 D.L.R. 632.

Slaght, in reply.

January 27, 1919. The judgment of the Court was read by MACLAREN, J.A.:—This is an appeal from a judgment of the Junior Judge of the District Court of the District of Temiskaming, of the 10th December, 1917, dismissing an action brought by a husband and wife for injuries sustained by the latter from a fall on an icy sidewalk.

About 8 o'clock in the evening of the 23rd March, 1917, the plaintiffs were proceeding eastward on the north side of Whitewood avenue, the principal street of the town, on their way to the post office, when the female plaintiff slipped and fell, breaking her arm and receiving other injuries. The street had naturally a considerable downward grade at the point in question. After passing a cross-street, there were two vacant buildings, and east of them the drug-store of one Thorpe. The town had two snow-ploughs, which were drawn by horses, and were used to clear the sidewalks after each snow-fall. Thorpe kept his sidewalk cleaned bare down to the cement. Opposite the vacant lots there was a considerable depth of hard snow and ice all winter, rising in the centre to what some of the witnesses called a "hog's back," and

having a less depth on either side. The thickness of the hard snow and ice 3 or 4 feet west of Thorpe's line was variously estimated by witnesses at from 8 to 12 inches, sloping from the above thickness at Thorpe's line. Seeing that it was so icy and slippery and dangerous and that pedestrians fell there from time to time during the winter, Thorpe used to sprinkle ashes on the slope, and sometimes hacked it with an axe. Several of the witnesses had slipped and fallen on this slope shortly before Mrs. Ashton—one of them twice.

For the defence it was urged that there was not the "gross negligence" on the part of the defendant corporation which the statute requires; that the sidewalk was kept reasonably clear of snow; that on the day of the accident there was the first thaw of the season, with a drizzling rain, which towards evening was frozen; that the sidewalk in question had been sanded; and that Mrs. Ashton was guilty of contributory negligence by not taking sufficient care on the icy sidewalk.

An employee of the defendant corporation testified that he had put sand on the sidewalk on the day of the accident, opposite vacant lots, but does not say that he put any sand on the dangerous slope in question, and indeed goes so far as to say that "there was not any slope there," although this is abundantly proved by the witnesses on both sides.

The course of the jurisprudence on this subject in our own Courts has been a singularly fluctuating one, especially since the legislation requiring such cases to be tried by a Judge without a jury. In the Canadian Municipal Manual of Meredith & Wilkinson, p. 636, there is given a list of 18 reported cases in which, strange to say, success was equally divided: 9 resulting finally in favour of the plaintiff and 9 in favour of the defendant corporation.

The results depend on the facts of the various cases, or perhaps rather on the appreciation of the facts by the various tribunals which have passed upon them. The one which most closely resembles the present case is *Drennan v. City of Kingston* (1896), 23 A.R. 406, in which the facts may be said to be almost on all fours with those of the present case, and which, after passing through three Courts in this Province, was finally decided by the Supreme Court of Canada: *City of Kingston v. Drennan* (1897),

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27 Can. S.C.R. 46. This is the first reported case on the subject, the original Act, slightly differing in form from the law as it now stands, but being to the same effect, having come into force on the 1st September, 1894, and the accident having taken place on the 8th February, 1895.

The original clause was in the Municipal Amendment Act 1894, 57 Vict. ch. 50, sec. 13, which amended the Consolidated Municipal Act, 1892, sec. 531, sub-sec. 1, by adding the following words: "Provided, however, that no municipal corporation shall be liable for accidents arising from persons falling, owing to snow or ice upon the sidewalks unless in case of gross negligence by, the corporation."

In the Municipal Act, 1913, this clause was re-enacted in sec. 460 (3)* and amended to read as follows:—

"Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk."

In the *Kingston* case, *supra*, "gross negligence" was defined by the Supreme Court of Canada as "very great negligence." While this gives us an alternative expression, it can hardly be said to be a definition or to throw much light on the subject.

In *Carlisle v. Grand Trunk R. W. Co.* (1912), 25 O.L.R. 372, 1 D.L.R. 130, the English cases on the subject of gross negligence are reviewed.

For a criticism of the use of the term "gross negligence" see Halsbury's Laws of England, vol. 21, p. 361, note (i).

I cannot find any evidence whatever of contributory negligence on the part of Mrs. Ashton.

The appeal should, in my opinion, be allowed, and judgment entered for \$150, the damages assessed by the trial Judge, with costs.

Appeal allowed.

*Section 460 (3) of the Municipal Act now in force, R.S.O. 1914, ch. 192 is in the same words.

[APPELLATE DIVISION.]

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PERRY v. VISE.

Land Titles Act—Conveyance by Owner of Tract of Land of Lot therein to Plaintiff—Failure to Register Conveyance—Sale of another Lot to Defendant—Defendant's Lot by Mistake Described by Number of Plaintiff's Lot—Tract of Land afterwards brought under Land Titles Act—Defendant Registered as Owner of Plaintiff's Lot—Rectification of Register as to both Lots—Powers of Court—R.S.O. 1914, ch. 126, sec. 115—Addition of Parties—Amendment of Pleadings.

The plaintiff purchased from a land company lot 287 according to a plan of a tract of land owned by the company, and obtained a conveyance thereof. The company, being desirous of putting the tract under the Land Titles Act, requested the plaintiff not to register his conveyance, and accordingly it was not registered. M., about the same time, purchased from the company lot 285, but by mistake the lot was described in the agreement for sale as lot 287. After the tract had been brought under the Act, the company, in intended pursuance of the contract of sale, transferred lot 287 to M., who sold and transferred his lot to the defendant, describing it as lot 287; the defendant executed a charge upon the lot in favour of M.; both the transfer and the charge were registered in the Land Titles office, and the defendant was there registered as the owner of lot 287 subject to the charge:—

Held, in an action brought for rectification of the register and other relief, that the registration of the defendant as owner of lot 287 did not enable her to hold it against the true owner, and the Court had power to undo the wrong that had been done to the plaintiff: sec. 115 of the Land Titles Act, R.S.O. 1914, ch. 126.

Proper parties being added and the pleadings being amended, the judgment of FALCONBRIDGE, C.J.K.B., directing a complete rectification of the register both as to lot 285 and lot 287, was affirmed,

THE following statement of the facts is taken from the judgment of MEREDITH, C.J.O.:—

This is an appeal by the defendant Vise from the judgment dated the 9th October, 1918, which was directed to be entered by the Chief Justice of the King's Bench after the trial of the action before him, sitting without a jury, at Toronto, on that day.

The action is brought for the rectification of the register in the Land Titles office at Toronto by substituting for the name of the appellant that of the respondent as owner of parcel 1184, free from incumbrances, and for a declaration that the respondent is the actual owner of lot number 287 (the same parcel) according to plan No. 1742 registered in the registry office for the registry division of the East and West Ridings of the County of York, and an injunction restraining the appellant from entering on or in any wise dealing with that lot "or from transferring or mortgaging" it or otherwise dealing with it; and that relief was granted by the judgment appealed from.

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After the land was brought under the Land Titles Act, a plan, No. M. 372, was registered in the Land Titles office, and lot number 287 bears the same number on that plan, but for the purposes of the Land Titles office is called parcel 1184.

The Sterling Trusts Corporation and Nellie McBride were added as defendants, pursuant to leave granted at the trial, and the judgment declares that the appellant purchased lot 285 according to plan M. 372 and that it was intended that the mortgage given by her and now held by the added defendant Nellie McBride should be on that lot, and that the appellant "is and should be the owner of the said lot number 285 subject to the mortgage thereon to the defendant Nellie McBride;" and it was ordered and adjudged that the Master of Titles at Toronto should rectify the register so as to register the appellant as owner of lot 285, and the defendant Nellie McBride as first mortgagee, "under the terms of the mortgage now registered against lot 287."

That relief was not sought by the statement of claim, and no amendment was made asking for it.

There is no serious dispute as to the material facts with regard to lot 287.

The Grand View Realty Company was the owner of the tract of land divided into lots by plan 1742. There was a farm-house on lot 287, and a shed on the adjoining lot to the east, lot 286. The respondent made an offer to purchase these lots on the 25th May, 1912, and his offer was accepted on the same day (exhibit 2).

The respondent subsequently purchased from the company lot 289, paid the full purchase-money for the three lots (\$2,623) on the 12th June, 1912, and on the June, 1912 (no doubt the 12th, as the affidavit of execution was sworn on that day), obtained from the company a conveyance of the three lots.

The company, being desirous of putting its land under the Land Titles Act, requested the respondent not to register the conveyance to him; and, in compliance with the request, it was not registered.

On the 1st June, 1912, William McBride purchased from the company lot 285, but by mistake the lot was described in the agreement for sale as lot 287. It was, however, described as a vacant lot. There was at this time a fence between lots 285 and 286—no on but near the boundary-line, and after his purchase

McBride planted a tree on the north-west corner of lot 285. On the 16 h March, 1913, William McBride transferred his interest in the agreement to Robert McBride. On the 17th March, 1913, and after the land had been brought under the Land Titles Act, the company, in intended pursuance of the contract of sale, on the 17th March, 1913, transferred to Robert McBride lot No. 487 according to plan M. 372 filed in the office of Land Titles at Toronto; describing the lot as No. 487 instead of 287 was due to a mistake in the company's office. This mistake having been discovered, the company on the 29th May, 1913, transferred to McBride lot 287, and McBride re-transferred lot 487 to the company.

Robert McBride sold his lot to the appellant on the 29th May, 1913, and in the offer of the appellant to purchase it, the lot is described as lot 287, and on the 13th June following McBride transferred the lot, describing it as No. 287, to the appellant, and she, on the 15th June, 1913, executed a charge upon the lot in favour of McBride for \$500. Both the transfer and the charge were registered in the Land Titles office, and the appellant is there registered as the owner of lot 287 subject to the charge. Robert McBride died on the 29th January, 1917; his executrices, Sarah McBride, the defendant Nellie McBride, and Mabel Carter, transferred the charge to the defendant Nellie McBride, and she has been registered as owner of it.

The Grand View Realty Company afterwards became merged in the Great Northern Land Company, and that company has transferred its interest to the added defendants, the Sterling Trusts Corporation.

December 19 and 20, 1918. The appeal was heard by MERE DITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

A. Cohen, for the appellant, argued that there was no privity between the plaintiff and the appellant, and that the learned trial Judge had erroneously construed sec. 115 of the Land Titles Act. He cited the Statute of Frauds as supporting his view of the case, and urged that the other parties defendant had been improperly added at the trial, and that there was no ground for saddling his client with the costs of these parties. He also referred to sec. 42 of the Act; *Farah v. Glen Lake Mining Co.* (1908), 17 O.L.R. 1, 8;

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Capital and Counties Bank v. Rhodes, [1903] 1 Ch. 631, 635. There is no evidence that there is a house on this lot, and the appellant paid taxes on it.

V. H. Hattin, for the respondent, the plaintiff, referred to *Gibbs v. Messer*, [1891] A.C. 248, 257; *Sydie v. Saskatchewan and Battle River Land and Development Co.* (1913), 25 W.L.R. 570, 14 D.L.R. 51.

Cohen, in reply, argued that the *Sydie* case was distinguishable, and that the *Gibbs* case was in his favour, citing that case at pp. 248, 254. He also cited *Syndicat Lyonnais du Klondyke v. McGrade* (1905), 36 Can. S.C.R. 251.

January 27, 1919. The judgment of the Court was read by MEREDITH, C.J.O. (after stating the facts as above):—It is clear that the appellant did not purchase or intend to purchase lot 287. What she bought was McBride's lot. McBride did not buy or intend to buy lot 287, but bought and intended to buy lot 285, of which he took possession, and on which, as I have mentioned, he planted the tree.

It is satisfactorily shewn, I think, that the lot which the appellant intended to purchase and did purchase was lot 285. According to her testimony when examined for discovery, she left everything in connection with the purchase to her son David. She admitted that her son told her that he had seen the lot that they were going to buy; and, in the absence of any evidence to the contrary—and there was none, for neither she nor the son was called as a witness at the trial—the proper inference is, I think, that the lot he saw was lot 285. The appellant admitted on her examination that she had no reason to believe that there was any building on the lot. There is, as I have mentioned, a house which has been occupied by a tenant of the respondent practically all the time since he purchased it, and has rented for \$11 or \$12 a month. The lot bought by McBride was a vacant lot, and was so described in the agreement for sale, and, besides all this, it was proved that, after the appellant's purchase, the son David endeavoured to sell his mother's lot to the respondent, that he described it as a lot he had bought from McBride next to the respondent's lot, that he was "getting cold feet on the deal," and would sell it cheap.

Can it be possible that, these being the facts, the registration of the appellant as owner of lot 287 enables her to hold it against

the true owner? I think clearly not, and that the Court is not powerless to undo the wrong that has been done to the respondent.

Section 115 of the Land Titles Act, R.S.O. 1914, ch. 126, provides that:—

“Subject to any estates or rights acquired by registration in pursuance of this Act, where any Court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision the Court is of opinion that a rectification of the register is required, the Court may make an order directing the register to be rectified in such manner as may be deemed just.”

I cannot think that the appellant acquired by registration any estate or interest in lot 287. She did not buy that lot from McBride, nor did he buy it from the Grand View Realty Company, and neither she nor he ever owned it; and it was therefore, in my opinion, competent for the Court to direct the rectification of the register as to the ownership of lot 287 as it has been directed to be rectified. The statement of claim should be amended by adding a claim for the relief that has been awarded in respect of lot 285; and, upon that being done, I would affirm the judgment and dismiss the appeal with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

CARROLL V. EMPIRE LIMESTONE CO.

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Landlord and Tenant—Lease of Beach of Lake Erie in Front of Lot—Description of Lot in Grant from Crown—Boundaries—Bank of Lake or Low Water Mark—Title of Lessor—Claim by Reversioner to Possession of Beach upon Expiry of Lease—Defence—Title in Crown and Lease or License from Crown—Application to Great Lakes of English Common Law Rule Attributing Ownership ad Medium to Riparian Proprietor—Bed of Navigable Waters Act, R.S.O. 1914, ch. 31, sec. 2—Title to Land—Estoppel.

The common law of England is not applicable to the Great Lakes of the Province of Ontario. The presumption of the common law that lands bordering on an inland lake extend to the middle of the lake, if there be any such presumption, is, in the case of the Great Lakes, rebutted. Any doubt is removed by sec. 2 of the Bed of Navigable Waters Act, R.S.O. 1914, ch. 31.

The bed of Lake Erie extends only to low water mark.

Stover v. Lavoie (1906), 8 O.W.R. 398, approved.

Keewatin Power Co. v. Town of Kenora (1908), 16 O.L.R. 184, referred to.

The action was brought for the recovery of possession of the beach in front of lot 5, from Lake Erie to high water mark or bank, in the 1st concession of the township of Humberstone, of which, as the plaintiff alleged, the defend-

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ant company was his tenant under a lease dated the 20th January, 1904, which expired on the 1st January, 1917. The defendant company denied the plaintiff's title to the beach and pleaded title in the Crown and a lease or license from the Crown.

In the Crown grant (1798) of the front part of lot 5, the description of lot 5 was that it began at the south-east angle of lot 6 "on the bank of Lake Erie," and two of the courses were south "to the bank of the lake" and westerly "along the bank" to the place of beginning:—

Held, that the south boundary of lot 5 was, not the bank, but the water's edge or low water mark.

Williams v. Pickard (1908), 17 O.L.R. 547, followed.

The plaintiff had no title to the beach in front of lot 5; and the defendant company was not estopped from disputing the plaintiff's claim of title.

The action was dismissed.

THE following statement of the facts is taken from the judgment of MEREDITH, C.J.O.:—

This is an appeal by the defendant from the judgment dated the 1st February, 1918, which was directed to be entered by the Chief Justice of the King's Bench, after the trial of the action before him, sitting without a jury at Welland, on the previous 7th November, 1917.

The action is brought for the recovery of possession of the beach in front of lot number 5, from Lake Erie to high water mark or bank, in the 1st concession of the township of Humberstone, of which, as the respondent alleges, the appellant was his tenant under a lease dated the 20th January, 1904, which expired on the 1st January, 1917.

Particulars were delivered by the respondent, in which it is stated that:—

"The portion of the beach claimed by the plaintiff is that portion of the plot not covered with water, marked 2.82 A.C. and outlined in red on the plan attached to the report of G. R. C. Conway, a blue print of which plan is to-day sent to the defendant's solicitors, and all the beach to the water's edge lying south of the said plot."

By the statement of defence, the appellant denies the alleged tenancy and alleges that the respondent has no title to the land, possession of which is claimed by him, and that it forms part of the water lot in front of lot number 5, the title to or ownership of which is in the Crown as represented by the Government of the Province of Ontario, and that the appellant is in possession and occupation of it under lease and license from the Crown, and that, if the beach does not form part of the lot, it is the property of the appellant.

By his amended reply the respondent alleges that the appellant is, and has been for many years, tenant to the respondent of the land described in the writ of summons, and has paid the rent to the respondent, and that the appellant is estopped from disputing the respondent's title or from setting up the title of any third party to the land.

To this pleading the appellant answers by alleging that in the year 1902 the appellant purchased from the respondent and his brother William E. Carroll, "all the property and estate owned and operated by" them "in the township of Humberstone, among which said property and estate was a certain lease dated the 22nd of October, 1897, from Annie Benner and Alexander Benner to the plaintiff, whereby the said Annie Benner and Alexander Benner demised and leased to the plaintiff, for a term of ten years, that certain tract of land being composed of the beach in front of lot number 5, from Lake Erie to high water mark or bank in the 1st concession of the said township of Humberstone, and which said lease and the premises thereby demised were assigned by the plaintiff to the defendant by deed of assignment dated the 22nd day of August, 1902;" and that, "subsequently and on the termination of the term in the aforesaid lease mentioned, the defendant took a lease from the said Annie Benner and Alexander Benner of the same tract of land for a term of 10 years from the 1st day of January, 1907."

It is further alleged that, at the time the appellant took the assignment of the lease and obtained the new lease, the appellant "had no idea or intention that it was taking a lease of any part of land covered by water, the title of which was in the Government," nor did it intend to take a lease of any portion of beach or land from Annie Benner lying south of the south boundary of the Benner lot, and that, if the lease covers it, it was so drawn by mutual mistake.

And it is also alleged that the lease from the Benners to the appellant terminated on the 1st January, 1917, and that, if the appellant paid rent to the respondent, as it accrued due under the lease, it was not a payment of rent for any land or beach occupied by the appellant lying to the south of the south boundary of the Benner lot, and that the rent, if paid, was paid by the appellant with "the understanding and belief only" that it was for the use

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and occupation of a small strip of land occupied by the appellant with its railway tracks "above what is known as high water mark."

The reasons for judgment of the learned Chief Justice are very brief and are confined to the statement that "the arguments in this case have been extended by the court reporter, and therefore it is sufficient for me to say that I agree with the contentions of the plaintiff's counsel."

It appears from the arguments of the respondent's counsel, referred to by the Chief Justice, that they rested the respondent's case on estoppel—contending that, having paid rent to the respondent after he became assignee of the reversion, the appellant was estopped from disputing his title and from setting up the title of any one else, and upon the further ground that the Benner lot extended south to low water mark, at least, and that the Crown had no title to the land between high and low water mark.

By letters patent dated the 31st December, 1798, the front of that lot and of lot number 4 was granted to Daniel Forsyth, and the metes and bounds are, "beginning at the south-west angle of lot number 5, being the south-east angle of lot number 6, on the bank of Lake Erie, then north to lands surveyed for James House, 97 chains, 50 links, more or less, then east 41 chains, then south to the bank of the lake, then westerly along the bank to the place of beginning."

On the 19th April, 1833, Ezekiel Forsyth conveyed to Conrad Shisler 100 acres of lot number 5, described as "commencing where a stake has been planted at the north-east angle of said parcel of land, thence west 20 chains, thence south 50 chains more or less to the lake, thence easterly along the bank of the lake, 20 chains more or less, thence north 50 chains more or less to the place of beginning."

Conrad Shisler, on the 15th February, 1845, conveyed to David Shisler 60 acres of lot number 5, described as the south part of lot number 5, "commencing at the south-east angle of said lot on Lake Erie, thence north to a stake planted at the bottom of the north side of sand hills and to land now owned by Abraham Shisler, thence westward along the main or large sand hills to the west limit of said lot, thence south to Lake Erie, thence easterly along the lake to the place of beginning.

David Shisler, on the 18th June, 1853, conveyed to William Halpin a part of lot number 5 described as followe: "commencing at a stone planted in presence of John Near and Abraham Shisles at about the distance of 6 chains west from the north-east angle of the south half of said lot, thence southerly to a stone also planted in the presence of the said John Near and Abraham Shisler, thence south-westerly to a stone planted as aforesaid, thence west to Lake Erie, thence north on the western boundary of said lot, to land owned by Abraham Shisler, and thence east to the place of beginning."

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This parcel is the Benner lot, and Annie Benner derived title to it from William Halpin, who was her father.

Annie Benner and her husband, on the 20th April, 1905, conveyed to the respondent the 25 acres which David Shisler had conveyed to her father, William Halpin.

The following conveyances were put in at the trial:—

(1) A conveyance dated the 22nd March, 1917, from Annie Benner to the respondent of "the beach in front of lot 5 from Lake Erie to high water mark or bank in the 1st concession of the township of Humberstone."

(2) A conveyance dated the 29th October, 1917, from Annie Benner, as executrix of her husband Alexander Benner, who had died on the 29th January, 1915, of the same land as was conveyed by her on the 22nd March, 1917, to the respondent.

(3) A conveyance dated the 12th January, 1886, from Abraham Shisler to the respondent of the water lots in front of the west half of lot number 3 and lots numbers 4, 5, and 6 in the 1st concession of the township of Humberstone.

The conveyance numbered (2) contains a recital that the grantor's husband "was seised at the time of his decease of an estate of inheritance in fee simple in the lands conveyed," and the conveyance was executed after the commencement of the action (11th May, 1917).

On the 1st March, 1918, the Crown (Ontario) leased to the appellant for a term of 10 years from the 15th April, 1918, the water lots in front of the west half of lot 3 and of lot 4 and in front of lots 5 and 6 in the 1st concession of the township of Humberstone, "reserving therefrom a right of access from Carroll Brothers' property on the west part of lot 5 to Lake Erie, and also reserving

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the right of Carroll Brothers to construct a wharf or dock on the lake in front of lot 6, with approaches thereto, the location of such dock and approaches to be subject to the approval of the Minister of Lands Forests and Mines.

April 5 and October 22. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

W. M. German, K.C., for the appellant company, referring to the lease under which it was alleged that the appellant was tenant from the plaintiff of the land in dispute, and which expired on the 1st January, 1917, argued that the plaintiff was never the landlord of the appellant. It was true that the appellant paid rent, but this was under mistake, and it was not estopped from denying the alleged tenancy. The plaintiff was claiming more land than the lease covered; and, even though the appellant might be estopped as against Benner, it was not estopped as against the plaintiff, whose conveyance from Benner did not cover the land in question. The title to the beach from Lake Erie to high water mark is in the Crown, and the appellant is in possession and occupation of it under lease and license from the Crown. When the "bank" of the lake is referred to, it means high water mark. [MEREDITH, C.J.O., referred to *Williams v. Pickard* (1908), 17 O.L.R. 547.] Counsel referred to *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184. [MEREDITH, C.J.O., thought that under the *Williams* case it must be held that the south boundary of the lot is the water's edge or low water mark.] But that was in the case of a river. [MEREDITH, C.J.O., said that it appeared to him that the case involved a question of the rights of the Province.] The appellant wanted the provincial authorities to come in, as the matter was one of great moment. *Parker v. Elliott* (1851), 1 U.C. C.P. 470, 481, was referred to. The *Keewatin* case is one of a river, or what is practically a river. Even if it should be held that the title of the lot goes to the low water mark, that would give the plaintiff only a small portion of what was claimed. On the question of estoppel, reference was made to *Seymour v. Franco* (1828), 7 L.J. K.B. 18, 31 R.R. 347; *Carvick v. Blaggrave* (1820), 1 Brod. & Bing. 531, 535, 21 R.R. 710, 714; Halsbury's Laws of England, vol. 13, p. 405, para. 568, and cases there cited. It is shewn that the plaintiff has no title, and either the title is in

the Crown, or the position is similar to that referred to in *Serjeant v. Nash Field & Co.*, [1903] 2 K.B. 304, *per* Stirling, L.J., at p. 315 (top). It is submitted that the lease in its true construction does not cover the land claimed: Halsbury, vol. 18, p. 413, para. 871.

Wallace Nesbitt, K.C., and *H. D. Gamble*, K.C., for the respondent, the plaintiff, argued that there was no evidence of the alleged payment of rent under mistake, and that no title to the lands in question had been shewn in the Crown. They referred to the *Parker* case, *supra*, at the foot of p. 491. The *Keewatin* case decided that the grant there carried the title to the low water mark, and it is suggested by Meredith, J.A., in his judgment in that case, that the same rule was applied in an Irish and a Scotch case. There are no tidal waters in this Province. They referred to *Dixon v. Snetsinger* (1873), 23 U.C.C.P. 235. There is no express decision as to the Great Lakes, and the *Keewatin* case is not one of a river, as alleged by the appellant. Reference was also made to the authorities and definitions collected in the *Parker* case, *supra*, and to Halsbury's Laws of England, vol. 13, pp. 404, 405, para. 568. The appellant must shew a better title in some one else than its landlord, which it fails to do.

German, in reply.

January 27, 1919. The judgment of the Court was read by MEREDITH, C.J.O. (after setting out the facts as above):—The first question to be considered is as to the position of the south boundary of lot number 5 on Lake Erie. The contention of the respondent is that the lot extends, at least, to the water's edge—low water mark—and the contention on the other side is that the south boundary is at high water mark.

If the common law of England is applicable, lot number 5 doubtless extends to the middle line of Lake Erie. The question of its applicability to the Great Lakes of this Province was referred to by the late Chief Justice Moss, delivering the judgment of the Court of Appeal, in *Keewatin Power Co. v. Town of Kenora*, 16 O.L.R. 184, where, after holding that the doctrine of the common law applied to the Winnipeg River, he went on to say:—

"I am not unmindful of the fact that in a number of instances there are found expressions of very learned and able Judges strongly favouring the view that the rule of the common law is

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inapplicable to the Great Lakes and rivers of this country. But, while there are these expressions, there has been no actual decision on the direct point" (pp. 190, 191).

This decision was pronounced on the 22nd January, 1908, and on the 9th October, 1906, the late Chancellor had decided in *Stover v. Lavoia* (1906), 8 O.W.R. 398, that the boundary of the plaintiff's land, which was the shore of Lake St. Clair, was "the edge of the water in its natural condition at low water mark," and in stating his opinion the learned Chancellor said:—

"Along the shore of a non-tidal river, or of a navigable inland lake, is now well understood to mean along the edge of the water at its lowest mark, both in this country and in the United States."

That the well-settled law in the United States is what it is stated to be, is undoubted, but it is to be borne in mind that in that country the common law of England has not been adopted by statute, as it has been in this Province.

Stover v. Lavoia was followed by Mabee, J., in *Servos v. Stewart* (1907), 15 O.L.R. 216.

In my opinion, the common law of England is not applicable to the Great Lakes of this Province. It, no doubt, has been held to apply to lakes in Great Britain and Ireland of considerable extent, but there are there no such bodies of water as our Great Lakes, and I venture to think that the common law is elastic enough, when introduced into this Province, to adapt itself to conditions here, and that in any case we should hold that the presumption of the common law that lands bordering on an inland lake extend to the middle of the lake, if there be any such presumption, is, in the case of the Great Lakes, rebutted. Any doubt that there might have been on the point is, however, removed by the Bed of Navigable Waters Act, R.S.O. 1914, ch. 31, the second section of which provides that:—

"Where land bordering on a navigable body of water or stream has been heretofore, or shall hereafter, be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English common law."

That the bed of Lake Erie extends only to low water mark is, I think, unquestionable, but it will have been observed that in the

Crown grant the description of lot number 5 is that it begins at the south-east angle of lot number 6 "on the bank of Lake Erie," and that two of the courses are south "to the bank of the lake" and westerly "along the bank" to the place of beginning.

But for the decision of the Court of Appeal in *Williams v. Pickard*, 17 O.L.R. 547, I should have been inclined to hold that the "bank of Lake Erie," and not the water's edge, is the southerly boundary of lot number 5. I am unable, however, to distinguish that case from the case at bar, and it must therefore be followed, with the result that it must be held that the south boundary of lot number 5 is the water's edge or low water mark; and, the lease of the 20th January, 1904, having expired, it follows that the respondent is entitled to recover whatever passed to him by the conveyance of the 20th April, 1906, from Annie Benner to him.

According to the description in the conveyance to Halpin, the boundaries of the land conveyed to him are fixed monuments—stones—and, according to the plan—exhibit 1—put in by the respondent at the trial, that description does not embrace any part of the land in question. The respondent cannot therefore recover on the strength of his own title, but is entitled to succeed only if the appellant is estopped from disputing his title and from setting up the title of any one else.

The respondent's case, on this branch of it, is that the appellant became, by the lease of the 20th January, 1904, from Annie Benner to the appellant, her tenant of the beach in front of lot number 5 from Lake Erie to high water or bank (the land described in that lease), and that the respondent, being by virtue of the conveyance by her to him of the 20th April, 1905, assignee of the reversion expectant on the determination of the lease, the appellant is estopped from denying his title to the land embraced in the lease, notwithstanding that the term of it has expired.

That the appellant paid rent to the respondent, and that the cheques were drawn in favour of the respondent, expressed to be for rent payable under the lease, is proved.

Assuming that this would have raised the estoppel for which the respondent contends, had the conveyance to the respondent embraced the land which was covered by the lease, there is, if I am right in my view as to what passed by the conveyance to

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Halpin, the insuperable difficulty in the way of the respondent's success that he is not the owner of the reversion because the land demised by the lease did not pass by the conveyance to him nor did it pass to him by the conveyance from Annie Benner of the 22nd March, 1917.

For these reasons, I am of opinion that the appeal must be allowed and the judgment at the trial be reversed, and that there should be substituted for it judgment dismissing the action.

As the parties are each standing on their strict legal rights, there is no reason why the costs throughout should not be borne by the respondent, and I would so direct.

Appeal allowed.

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RE SUN LIFE ASSURANCE CO. AND McLEAN.

Insurance (Life)—Endowment Policy—Moneys Payable to Assured at End of Fixed Period—Policy in Force and Assured Alive at End of Period—Designation of Wife as Beneficiary—Revocation of, and Designation of Mother after End of Period—Ontario Insurance Act, sec. 171—Optional Benefits—Right of Assured to Select Benefit other than Payment in Cash—Refusal of Leave to Company to Pay Amount of Cash Benefit into Court.

By an endowment policy issued in 1898, the company assured the life of M. for \$1,000, and contracted to pay that sum to M. on the 1st October, 1918, or, should M. die before that day, to his mother; and it was provided that, should the policy be in force on the 1st October, 1918, M. should be entitled to certain optional benefits—e.g., the right to convert the sum assured and profits into a paid-up policy payable at the death of M. In 1906, M., by an instrument in writing, declared that the policy and assurance should be for the benefit of his wife. When the policy matured on the 1st October, 1918, M. was still alive, and had made no further or other designation of a beneficiary. After the 1st October, the company drew a cheque in favour of M.'s wife for a sum said to be the amount of the policy with profits, less the amount of a loan, and sent the cheque to M. for delivery to his wife. M. returned the cheque, and filed with the company a new designation making his mother the beneficiary. The company then applied for leave to pay the amount of the cheque into Court and to be discharged from liability upon the policy. The application was supported by M.'s wife, but opposed by M. and his mother, M. alleging that he desired to exercise the option of taking a paid-up policy payable at his death:—

Held, by ROSE, J., that the policy was a subsisting policy, and the company's contract with M. had not been discharged, when, after the 1st October, 1918, he attempted to revoke the benefits theretofore conferred upon his wife and to substitute his mother as beneficiary.

(2) That the attempt was successful, and whatever rights the wife had theretofore possessed passed to the mother: see the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 171.

(3) That M. or his mother had a right to select some benefit other than the payment of the cash which the company desired to pay into Court, and the order asked for could not be made without defeating that right.

Held, by a Divisional Court, on appeal from the order of ROSE, J., that the application for leave to pay the money into Court was rightly dismissed; but the order should have been confined to that; any adjudication as to the rights of the wife and mother was premature.

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MOTION by the company for leave to pay into Court the amount said to be sufficient to discharge the company of all liability upon a certain endowment policy.

January 17. The motion was heard by ROSE, J., in Chambers.

L. Macaulay, for the company.

J. W. Payne, for D. B. McLean and Ophelia McLean.

J. F. Holliss, for Adèle Caroline McLean.

January 29. ROSE, J.:—This is a motion, made on behalf of the Sun Life Assurance Company of Canada, for leave to pay into Court the amount said to be required to discharge the company of all liability upon a certain endowment policy. The policy is dated the 4th October, 1898. By it the company assured the life of D. B. McLean in the sum of \$1,000 and contracted to pay that sum to the assured on the 1st October, 1918, or, should the assured die before that day, then to his mother, Ophelia McLean; and it was provided that, should the policy be in force on the 1st October, 1918, the assured should be entitled to certain optional benefits, e.g., to convert the sum assured and profits into a paid-up policy payable at the death of the assured, or to withdraw a certain sum in cash and receive in addition a paid-up policy for \$1,000.

By an instrument dated the 21st August, 1906, D. B. McLean declared "that the said policy and the assurance thereby effected" should "be for the benefit of Adèle Caroline McLean, and" did thereby "specially appropriate the said policy accordingly and revoke all interest any other person or persons" might "have in it." Adèle Caroline McLean is the wife of the assured.

After the 1st October, 1918, the company issued a cheque in favour of Adèle Caroline McLean for a sum said to be the amount of the policy with profits, less the amount of a loan standing against the policy, and sent the cheque to the assured for delivery to the payee. The assured returned the cheque, and filed with

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the company a new designation of beneficiary, in which he declared that "the said policy and the assurance thereby effected" should be for the benefit of his mother "in the place and stead of Adèle Caroline McLean," and that he did "specially appropriate the said policy accordingly and revoke all interest of the said Adèle Caroline McLean or of any other person or persons in it."

Adèle Caroline McLean asserts that on the 1st October, 1918, she became entitled to payment of the sum assured and profits, and that neither the assured nor his mother has any present interest. She, therefore, supports the company's application and asks that the money be paid into Court and be paid out to her. The assured and his mother oppose the application, the assured alleging that it is his desire to exercise the option to convert the sum assured and profits into a paid-up policy payable at his death.

A question has been raised as to whether the instrument of the 21st August, 1906, which does not purport to be an assignment of the policy, but merely an "appropriation" made "in accordance with the terms of the statutes in that behalf," had the effect simply of substituting Adèle Caroline McLean for Ophelia McLean, as the person to receive the sum assured in case D. B. McLean should die before the 1st October, 1918, or really amounted to a designation of Adèle Caroline McLean as the person entitled not only to receive whatever money might become payable upon the death of D. B. McLean before the 1st October, 1918, but also to receive any sum that might be payable by reason of D. B. McLean surviving until the 1st October, 1918, and to exercise whatever options might, but for the instrument, have been exercised by D. B. McLean after the day mentioned. I do not think it necessary or desirable to express any opinion upon that question on the present application: because it appears to me that, as regards the relief now sought, the result is the same whichever view of the effect of the instrument is correct. The company's contract is with D. B. McLean: he is the assured, and, whether his designation of Adèle Caroline McLean as beneficiary had the effect of designating her merely as the person to receive the money in case of his death or designated her also to receive the money (or, instead of receiving the money, to receive, e.g., some money and a new policy) in case he lived, I cannot find in the statute anything to

deprive him, during his life and prior to the discharge of the policy by payment or otherwise, of his statutory right to substitute a new beneficiary. Notwithstanding the fact that the company had issued a cheque, which had not reached the hands of Adèle Caroline McLean, if she was the proper person to receive payment, the policy was a subsisting policy, and the company's contract with D. B. McLean had not been discharged, when, in November, 1918, he attempted to revoke the benefits theretofore conferred upon his wife and to substitute his mother as beneficiary; and I think that his attempt was successful, and that whatever rights Adèle Caroline McLean had theretofore possessed passed to Ophelia McLean. See the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 171.* From this it seems to follow that D. B. McLean or Ophelia McLean has some right to select some benefit other than the payment of the cash which the company desires to pay into Court, and that the order asked for could not be made without defeating that right. The motion, therefore, fails and will be dismissed. Adèle Caroline McLean must pay the costs of the assured and his mother—the issue was really between her and them; the company will neither receive nor pay costs.

There is no issue raised as between D. B. McLean and Ophelia McLean, and I express no opinion as to their respective rights under the policy and the instrument of November, 1918.

The order of ROSE, J., as settled and issued, was as follows:—

2. It is declared that whatever rights Adèle Caroline McLean had in the said policy have passed to Ophelia McLean and that

*171.—(1) Every person of the full age of 21 years shall have an unlimited insurable interest in his own life and may effect *bonâ fide* at his own charge insurance of his own person for the whole term of life, or any shorter term for the sole or partial benefit of himself, or of his estate, or of any other person, whether the beneficiary has or has not an insurable interest in the life of the assured, and the insurance money may be made payable to any person for his own use or as trustee for another person.

(3) The assured may designate the beneficiary by the contract of insurance or by an instrument in writing . . . and may by that contract or any such instrument, and whether the insurance money has or has not been already appointed or apportioned, from time to time appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, but not so as to alter or divert the benefit of any person who is a beneficiary for value, nor so as to alter or divert the benefit of a person who is of the class of preferred beneficiaries to a person not of that class or to the assured himself or to his estate.

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the said Adèle Caroline McLean has no further interest in the said policy.

3. And it is ordered that the motion be and the same is hereby dismissed.

4. And it is further ordered that Adèle Caroline McLean do pay to D'Arcy Bertrand McLean and Ophelia McLean their costs of this application forthwith after taxation thereof and that no costs shall be received or paid by the applicants.

Adèle Caroline McLean appealed from the order of ROSE, J.

March 5. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, SUTHERLAND, and MIDDLETON, JJ.

J. F. Holliss, for the appellant. The question is, can an assured, under an endowment policy, change the beneficiary after the maturity of the contract. The Judge in Chambers held that the assured had such a right, and also that he had the right to exercise certain options. In these holdings the Judge was in error. The policy was the subject of a declaration of a trust in favour of the appellant; and on the 1st October, 1918, the date of maturity, became payable to and vested in the appellant as the *cestui que trust*, and the control of the assured over the fund ceased at that time, just as if it had matured by the dropping of life. The assured had no right after maturity to exercise the options contained in the policy: see the Ontario Insurance Act, R.S.O. 1914, ch. 183, secs. 178 (2) and 179 (1).

J. W. Payne, for the assured and for Ophelia McLean, respondents, contended that an endowment policy was different from a policy payable at death, and that the order appealed against was right. The assured, after the maturity, had a right to change the beneficiary up to the time of actual payment. If the naming of a beneficiary under a policy created a trust in favour of that beneficiary, it was only a trust in the event of death, and was subject to the right of alteration by the assured, as set out in the Act.

L. Macaulay, for the insurance company, said that, if it was the law that the assured could, after the maturity of the policy but before actual payment, change the beneficiary, it would save insurance companies much trouble. He argued, however, that the date of maturity of an endowment policy was the date at

which the endowment benefit was payable, and at that date it ceased to be an insurance, and became a debt payable to the beneficiary; and the options were no longer exercisable.

[In the course of the argument, members of the Court expressed the view that the Judge in Chambers had no power to make the declaration contained in para. 2 of the order that Adèle Caroline McLean had no further interest in the policy. *Macaulay* stated that the Judge had dealt with that question because all parties had agreed that he should. Counsel agreed that para. 2 might be stricken out of the order.]

At the conclusion of the hearing, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—It is admitted that, under the policy, upon the expiry of the endowment period, the assured is given several “options;” and that, at the time of the making of the application for leave to pay the money into Court, he had not exercised any; and also that, when it was pending, he elected to take a paid-up policy, payable at his death. The application of the insurance company for leave to pay the money into Court was therefore rightly dismissed.

But the order of the learned Judge went beyond that and purported to deal with the claims of the wife and mother to the money.

Until the policy has matured, any such adjudication is premature: the assured may change his “beneficiary.”

The appeal should be dismissed, but the order should be varied so as to confine it to a dismissal of the motion, and there should be no costs here or below.

Order varied.

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[APPELLATE DIVISION.]

GREENFIELD V. CANADIAN ORDER OF FORESTERS.

Insurance (Life)—Friendly Society—Dues of Member—Payment to Agent of Proper Officer—Established Practice—Authority to Receive—Ministerial Act—Findings of Jury.

In an action, by the beneficiary named in a life insurance certificate issued by the defendants, a friendly society, to recover insurance moneys and funeral benefits, the defendants pleaded that, by reason of the amount of a monthly assessment not having been paid, the assured was not in good standing as a member of the society at the time of his death, and that the certificate was not then in force. At the trial, the jury found that the amount alleged not to have been paid had been paid to K.; that K. had authority to receive it; and that it was so paid and received for the convenience of all parties concerned. W., the financial secretary, was the person designated by the society to receive payments; but for a great number of years members in a certain locality had made their monthly payments to K., who had a book in which the names of the members were entered, and when a payment was made gave a receipt signed by him (K.) as financial secretary. W. called regularly and received the moneys that had been paid to K.:—

Held, that payment to K. was, in the circumstances, payment to W.; and, upon the findings of the jury, the plaintiff was entitled to recover.

Although an agent may not appoint a sub-agent to do anything as to which the agent has to exercise a discretion, he may appoint a sub-agent to do mere ministerial acts, such as the receipt of payments.

Rossiter v. Trafalgar Life Assurance Association (1859), 27 Beav. 377, 383, 384, applied and followed.

Judgment of the County Court of the County of Brant affirmed.

THIS action was brought by Agnes Greenfield in the County Court of the County of Brant.

The statement of claim was as follows:—

1. The plaintiff is a married woman residing at the township of South Dumfries, in the county of Brant.

2. The defendants are an association duly incorporated for the purpose of providing insurance and sick and funeral benefits for the members of the Order.

3. The defendants duly effected an insurance of \$1,000 on the life of William H. Greenfield and duly issued their certificate therefor, wherein they agreed to pay, on the death of the said William H. Greenfield, one half of the said amount, or \$500, to the plaintiff, together with \$25 funeral benefits.

4. The said William H. Greenfield was the son of the plaintiff, and died some months ago; proof of death was duly delivered to the defendants and everything done which would entitle the plaintiff to receive from the defendants the said sum of \$500 and the said \$25 for funeral benefits.

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5. The defendants have neglected and still neglect and refuse to pay the said sum or any part thereof.

6. The plaintiff claims:—

1. Payment of the said sum of \$525.

2. Such further and other relief as the nature of the case may require.

3. Her costs of this action.

The statement of defence was as follows:—

1. The defendant, the High Court of the Canadian Order of Chosen Foresters (sued herein as “Canadian Order of Foresters”), is a corporation duly registered as a friendly society under the Ontario Insurance Act.

2. The defendant society admits the allegations contained in paragraphs 2 and 5 of the plaintiff’s statement of claim, and that on or about the 12th day of May, 1905, life insurance certificate number 93564 was issued by the defendant society to William Harris Greenfield, but denies all the other allegations contained in the plaintiff’s statement of claim, and puts the plaintiff to strict proof thereof.

3. The payment of \$500 which the plaintiff seeks to recover under the said life insurance certificate number 93564, issued by the defendant society to William Harris Greenfield, is, by the terms of the said certificate, subject to the condition that the said William Harris Greenfield shall at the time of his death be a member in good standing of the defendant society, and that he shall have in all things complied with the constitution and rules and regulations of the Order and the subordinate court of which he may be a member, which shall from time to time be in force, in every matter and particular that is material to the contract—and the defendant society claims the benefit of the said condition and of the said constitution, rules, and regulations in its defence to this action.

4. Under section 53 (1) of said constitution and rules, each beneficiary member shall pay to the financial secretary of the court in which he holds his membership, on or before the first day of each month for that month, a monthly assessment in advance according to the table of rates set forth therein, and the said William Harris Greenfield, mentioned in the plaintiff’s statement of claim, failed to pay the monthly life insurance assessment which he should have paid under the provisions of the said section 53 (1)

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of the said constitution and rules on or before the 1st day of April, 1917, and thereby became on the 2nd day of April, 1917, suspended from membership in the said defendant society, as provided in section 73 of the said constitution and rules, and the said William Harris Greenfield was not a member in good standing of the said defendant society at the time of his alleged death, and the life insurance certificate number 93564 mentioned in the plaintiff's statement of claim, at the time of the alleged death of the said William Harris Greenfield, was null and void, and neither the plaintiff nor any other person is entitled to recover any sum whatever thereunder.

5. It is provided by sections 89, 90, and 92 of the said constitution and rules that every member of the sick and funeral benefit branch of the defendant society shall pay on or before the first day of each month the monthly payment therein prescribed in order to maintain his membership in the said sick and funeral benefit branch, and the said William Harris Greenfield failed to pay the monthly assessment which he should have paid under the provisions of the said sections 89, 90, and 92 of the said constitution and rules, on or before the 1st day of April, 1917, and thereby became on the 2nd day of April, 1917, suspended from membership in the said sick and funeral benefit branch of the said defendant society, as provided under section 101 of the said constitution and rules, and the said William Harris Greenfield was not a member in good standing of the said sick and funeral benefit branch of the said defendant society at the time of his alleged death, and under section 103 of said constitution and rules neither the plaintiff herein nor any other person is entitled to any funeral benefit on account of the alleged death of the said William Harris Greenfield.

June 11, 1918. The action was tried before HARDY, Co. C.J., and a jury.

W. S. Brewster, K.C., for the plaintiff.

J. G. Farmer, K.C., for the defendants.

A nonsuit was moved for by the defendants; the learned Judge reserved judgment thereon; questions were left to the jury, and they answered them in favour of the plaintiff, as follows:—

1. Did Stuart and Leslie Greenfield pay the April dues to Keefer? A. Yes.

2. Had Keefer, the postmaster, authority to receive the Lodge dues? A. Yes.

3. For whose convenience was it done? A. All parties concerned.

4. What verdict do you find? A. In full for the plaintiff. All agreed upon the verdict.

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September 11, 1918. HARDY, Co. C.J.:—It was intimated at the trial that there would probably be a settlement of this action, but this I understand has not been arrived at.

I shall therefore give judgment on the question of nonsuit reserved at the trial.

I have examined the cases cited by the defendants' counsel, viz.: *Summers v. Commercial Union Assurance Co.* (1881), 6 Can. S.C.R. 19; *Canadian Fire Insurance Co. v. Robinson* (1901), 31 Can. S.C.R. 488; *Hoefner v. Canadian Order of Chosen Friends* (1898), 29 O.R. 125; *Ryan v. Catholic Order of Foresters* (1902), 1 O.W.R. 547; Halsbury's Laws of England, vol. 1, p. 169; and I have also consulted *Wells v. Independent Order of Foresters* (1889), 17 O.R. 317; *Smith v. Excelsior Life Insurance Co.* (1912), 22 O.W.R. 863, 3 O.W.N. 1521, 4 D.L.R. 99; *Horton v. Provincial Provident Institution* (1889), 17 O.R. 361; *Tattersall v. People's Life Insurance Co.* (1905), 9 O.L.R. 611; *Redmond v. Canadian Mutual Aid Association* (1891), 18 A.R. 335; and the late case in the Supreme Court of Canada, *Royal Guardians v. Clarke* (1914), 49 Can. S.C.R. 229, 17 D.L.R. 318, cited by Mr. Brewster for the plaintiff.

The defendants' contention was that the deceased was not a member in good standing at the time of his decease, in that the postmaster, Keefer, had no authority to receive the dues, notwithstanding that it had been the custom for many years for members to pay dues to him as the clerk or agent of the financial secretary.

The jury found that the dues for the 17th April had been paid; that Keefer had authority to receive them; and that they were paid to him for the convenience of all parties; and returned a verdict for the full amount of the claim.

I do not think I should interfere with the findings of the jury. It was within their province to find that the defendants were bound by this long established practice and acquiescence, and I

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think their findings can be supported by the principles laid down in the late case in the Supreme Court of *Royal Guardians v. Clarke*, 49 Can. S.C.R. 229, 17 D.L.R. 318, above referred to.

I would therefore order judgment to be entered for the plaintiff for \$525 and costs.

The defendants appealed from the judgment of the County Court.

January 27 and 31, 1919. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

S. F. Washington, K.C., and *Lyman Lee*, for the appellants, argued that, even if the dues were paid to Keefer, which he denied, it was not a good payment, as he was not authorised to receive them. They also argued that there was not and could not be any waiver of the provisions of the constitution requiring payment to the financial secretary; and that payment of dues to any one else was not binding on the society. They referred to *Summers v. Commercial Union Assurance Co.*, 6 Can. S.C.R. 19; *Rossiter v. Trafalgar Life Assurance Association* (1859), 27 Beav. 377; and note on p. 385, where it is stated that the case was affirmed on appeal, by the Lords Justices. It is not, however, an authority on the point in question here, which is governed by the maxim *delegatus non potest delegare*. They also referred to *Devins v. Royal Templars of Temperance* (1892), 20 A.R. 259; *Hoefner v. Canadian Order of Chosen Friends*, 29 O.R. 125; *Ryan v. Catholic Order of Foresters*, 1 O.W.R. 547; *Atkinson v. Dominion of Canada Guarantee and Accident Co.* (1908), 11 O.W.R. 449; *Smith v. Excelsior Life Insurance Co.*, 3 O.W.N. 1521, 22 O.W.R. 863, 4 D.L.R. 99; *Royal Guardians v. Clarke*, 49 Can. S.C.R. 229, 17 D.L.R. 318.

W. S. Brewster, K.C., for the respondent, the plaintiff, relied upon the findings of the jury and the judgment of the learned trial Judge. He referred to Evans's *Law of Principal and Agent*, 2nd ed., pp. 53, 54; Story's *Law of Agency*, 8th ed., p. 14; *Burial Board of St. Margaret Rochester v. Thompson* (1871), L.R. 6 C.P. 445, 457.

January 31. At the conclusion of the hearing, the judgment of the Court was delivered by MEREDITH, C.J.O.:—The Court is

very much obliged to counsel for the elaborate arguments they have presented. The cases on which Mr. Washington relied have, we think, no application. It is not a question of waiver: the question is whether the dues were paid to Watson.

The evidence establishes that there has been a practice extending over a great number of years—I think it was said by Mr. Washington, in opening the case, of 30 years—for members who lived outside of the village in which Watson lived of paying to Keefer their dues. A book was kept in which the names of the members were entered, and Keefer signed the receipt as financial secretary—the office that Watson occupied. Watson called regularly—about the 7th of the month—and received these moneys that had been paid to Keefer.

Watson and Keefer say that the latter was not an agent to receive the dues; that may be perfectly right in the sense that he was not formally appointed as agent, but the conduct throughout of the parties leads to the conclusion—the only possible conclusion—that these payments were made to Keefer, and that he was receiving them, for Watson; it is true that this was a convenience to the members who paid in that way, but Watson recognised the payments as having been received by him. It seems to me therefore that the respondent has proved that the payment to Watson as to which it was said that there was a default disentitling the respondent to recover, was made. There is, besides, the finding of the jury that Keefer had authority to receive the dues.

Now the language of the Master of the Rolls in *Rossiter v. Trafalgar Life Assurance Association*, 27 Beav. 377, is applicable. He there says (pp. 383, 384):—

“Another question then arises:—was the money ever paid? because, if the premium was not paid, undoubtedly that might make a difference; but here is a receipt proved, signed by Erlam and Williams for Constable & Co., and all the evidence shews that Erlam and Williams were acting for Constable & Co. The receipt by Erlam and Williams was one by which Constable & Co. would be bound, and was in fact as much a payment to Constable & Co. as a payment to a foreman in a shop in London would be a payment to the master himself. If so, I have the four documents which are required, and I have also the proof of the receipt of the money.”

In the same case it is pointed out that, though an agent may not appoint a sub-agent to do anything as to which the agent has

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to exercise a discretion, he may appoint a sub-agent to do mere ministerial acts, such as the receipt of payments. The authorities upon that (in addition to those cited by Mr. Brewster) are: Halsbury's Laws of England, vol. 1. p. 170, para. 368; Corpus Juris, vol. 2, p. 689; Bowstead on Agency, p. 110, the 6th case cited.

It is very probable that no question would have been raised in this case but for the unfortunate dispute as to whether the dues were actually paid: Keefer stoutly denied that he had received them; the jury found that he had.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

Feb. 7

SERCOMBE v. TOWNSHIP OF VAUGHAN.

Highway—Bridge Breaking under Weight of Loaded Motor-truck—Excessive Width of Vehicle—Load of Vehicles Act, 1916, secs. 2 (b), 6—Vehicle Unlawfully on Highway—Trespasser—Dismissal of Action for Damages for Injury to Vehicle—Counterclaim for Injury to Bridge Allowed.

The plaintiff's heavily laden motor-truck, more than 90 inches wide, broke through a bridge forming part of a highway in the township of V. The bridge was smashed and the truck damaged:—

Held, that the plaintiff had no right to have upon the highway a vehicle of greater width than 90 inches (Load of Vehicles Act, 1916, 6 Geo. V. ch. 49, sec. 6, and sec. 2 (b)), and in respect thereof was a trespasser: he could not recover from the township corporation for the injury to his truck; and the corporation were entitled to recover from him the damages occasioned by the smashing of the bridge.

That the extra width might have had nothing to do with the accident—that the same thing might have happened if the vehicle had been a lawful one—was of no significance.

Goodison Thresher Co. v. Township of McNab (1910), 44 Can. S.C.R. 187, *Etter v. City of Saskatoon* (1917), 39 D.L.R. 1, and *Roe v. Township of Wellesley* (1918), 43 O.L.R. 214, applied.

An appeal by the defendants, the Municipal Corporation of the Township of Vaughan, from the judgment of COATSWORTH, Jun. Co. C.J., in favour of the plaintiff for the recovery of \$338.82 damages in an action brought in the County Court of the County of York, and dismissing the defendants' counterclaim.

The action was for damages for injury to the plaintiff's motor-truck, which was running on a public highway in the township of Vaughan, when it broke through a bridge. The counterclaim was for the injury to the bridge.

January 16. The appeal was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

William Proudfoot, K.C., for the appellants, argued that the plaintiff's motor-truck should not have been on the highway at all, as it was a contravention of the Load of Vehicles Act, 1916, 6 Geo. V. ch. 49, sec. 6 (O.), to have such a vehicle on that highway. Therefore he had no higher rights than a mere trespasser; and, as there were no traps in the road, the plaintiff could not hold the defendants responsible for damages: *Roe v. Township of Wellesley* (1918), 43 O.L.R. 214; *Etter v. City of Saskatoon* (1917), 39 D.L.R. 1; *Goodison Thresher Co. v. Township of McNab* (1910), 44 Can. S.C.R. 187.

H. A. A. Newman, for the plaintiff, respondent, argued that the vehicle did not come within the Act, as the real intention of the Act was to limit the load, not the tire-width.

Proudfoot, in reply.

February 7. RIDDELL, J.:—The plaintiff is the owner of a motor-truck of dead weight 11,100 lbs. Loaded with merchandise, which the learned trial Judge finds on satisfactory evidence to have been about 8,000 lbs., the truck was running on a public highway in the township of Vaughan, well within 8 miles an hour, when it broke through a bridge in the highway. The plaintiff sued for damages and was awarded \$333.82 by His Honour Judge Coatsworth, who also dismissed the counterclaim of the defendants. The defendants now appeal.

There were several points fully and ably argued by counsel; but, in the view I take of the case, it can be disposed of adversely to the plaintiff on one simple ground.

The Load of Vehicles Act, 1916, 6 Geo. V. ch. 49, by sec. 6, provides that "no vehicle shall have a greater width than 90 inches except traction engines"—"vehicle" being interpreted by sec. 2 (b) as including motor-vehicles such as this was: it is conclusively proved that "this vehicle," not being a traction-engine, was almost 96 inches wide. The plaintiff had no right to have such a vehicle on the highway at all, and in respect thereof he was a mere trespasser. The corporation owed him no duty except to refrain from setting traps for him and from maliciously or wilfully injuring him, and he must take the road as he finds it.

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Cases such as *Goodison Thresher Co. v. Township of McNab*, 44 Can. S.C.R. 187, *Etter v. City of Saskatoon*, 39 D.L.R. 1, *Roe v. Township of Wellesley*, 43 O.L.R. 214, all have a bearing on the point, although not on all fours.

That the extra width had or might have had nothing to do with causing the accident has, I think, no significance—the motor-truck should not have been there at all.

I would allow the appeal and dismiss the action, both with costs.

The same considerations dispose of the appeal against the dismissal of the counterclaim.

The plaintiff smashed the defendants' bridge unlawfully, and should pay for it—it is of no importance that the same thing might have happened had the plaintiff used a lawful instrument—the fact is that he did not.

There should be judgment on the counterclaim for the sum necessary to replace the bridge, to be agreed upon by the parties, or, in the absence of agreement, on a reference.

The defendants should have their costs throughout on the County Court scale.

LATCHFORD, J.:—In this case, as in *Roe v. Township of Wellesley*, 43 O.L.R. 214, the motor-vehicle was unlawfully upon the highway, and therefore the plaintiff can be afforded no redress.

Not only does his action fail, but he is liable to the municipality for the damage done by his truck, prohibited as that was from using the road.

The appeal should be allowed with costs here and below. If the parties cannot agree on the amount of the damages, there should be a reference.

FERGUSON, J.A., and ROSE, J., concurred.

Appeal allowed.

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STRAUS LAND CORPORATION LIMITED V. INTERNATIONAL HOTEL
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Landlord and Tenant—Action by Landlord for Declaration of Forfeiture of Lease, for Rent, Damages for Breaches of Covenants, and other Relief—Waiver of Forfeiture by Claiming Rent Accrued after Forfeiture and Forfeiture in same Action—Breach of Covenant to Repair—Alteration in Premises—Consent—Change Made in Building Differing from Change Consented to—Damages—Breach of Covenant not to Assign or Sublet—Nominal Damages—Abandonment on Hearing of Appeal of Claim for Rent—Reinstatement as Indulgence—Costs of Action, Appeal, and Reference as to Damages.

In this action the plaintiffs (landlords) claimed against their tenants: (1) a declaration of forfeiture of the lease for altering the building on the premises in breach of the covenant to repair and for subletting without leave in breach of another covenant; (2) all arrears of rent; (3) damages for the said breaches of the covenant to repair; (4) mesne profits; (5) further and other relief. The rent claimed accrued after all the acts upon which forfeiture was hypotheated had been committed:—

Held (ROSE, J., dissenting), that, the acts alleged as justifying forfeiture not being continuing acts, the plaintiffs, by claiming both rent and forfeiture in the same action, had waived the forfeiture. There was no act unequivocally shewing that the landlords insisted upon the forfeiture until the action was begun by the issue of a writ. The abandonment at the trial or later of the claim for rent could not reinstate the forfeiture.

Bevan v. Barnett (1897), 13 Times L.R. 310, approved and followed.

The change made by the defendants in the building could not lawfully have been made, it was admitted, without the consent of the plaintiffs. The plaintiffs did consent to a change in the external front of the building by making a one-store entrance with one door; but the defendants made a two-store entrance with two doors:—

Held, that the difference was substantial, and the defendants were wrongdoers: if the building was better than it would have been had the change been limited to what was consented to, that did not help the defendants: the plaintiffs were entitled to damages for the wrong done; and the damages were assessed by the appellate Court at \$200, subject to a reference if either party desired it.

The damages for subletting without leave were merely nominal, and need not be considered.

The plaintiffs, upon their appeal from the judgment at the trial, which dismissed the action, abandoned their claim for rent, and were *held* to be in strictness barred of the right to recover it; nevertheless, in order to do justice, the Court offered to put them in the same position as if they had appealed as to the rent, and to give them judgment for the gales which had accrued before the commencement of the action, which had been paid into Court.

And *held*, that there should be no costs of the action down to and inclusive of the judgment at the trial. If the plaintiffs should be willing to accept a judgment barring them of the right to rent due before action, they should have the costs of the appeal; but, if they took judgment for the rent, they should, as a term upon receiving an indulgence, pay the defendants' costs of the appeal. If the plaintiffs should accept the rent, the money paid into Court should be paid out to them, less the defendants' taxed costs of the appeal, which should be paid out to them. If neither party desired a reference, the plaintiffs should have judgment also for \$200 in full of all damages for breaches of covenants, without costs; if a reference should be taken, the costs thereof should be in the discretion of the Master, and judgment entered accordingly.

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ACTION by landlords against tenants for a declaration of forfeiture of a lease of an hotel and premises, for possession, arrears of rent, damages, and other relief.

The action was tried by FALCONBRIDGE, C.J.K.B., without a jury, at Sandwich.

O. E. Fleming, K.C., and *A. H. Foster*, for the plaintiffs.

E. S. Wigle, K.C., for the defendants.

August 13, 1918. FALCONBRIDGE, C.J.K.B.:—In their statement of claim the plaintiffs ask for forfeiture of the lease and possession of the hotel property: (1) for non-payment of rent; (2) for breach of covenant to repair; (3) for breach of covenant not to assign or sublet without leave; (4) for damages.

At the trial claim No. 1 was abandoned.

(2) As to breach of covenant to repair. Plans and specifications had been agreed upon for certain repairs to the front of the building. The defendants undertook to make an immaterial variation in the design, altering the front so as to make two entrances and breaking up the interior into two shops. I find, upon the evidence, that the value of the property as a revenue-producer was increased, instead of being decreased, by the alteration. It may be that, under the covenant, the plaintiffs have the right to have the building restored at the end of the term to the same style and condition in which it was at the time of the demise or to the design contemplated in the plans and specifications agreed upon: *Sullivan v. Doré* (1913), 5 O.W.N. 70, at p. 72, 13 D.L.R. 910. Repairs of some kind were necessary, as shewn by the evidence of the sanitary inspector.

No complaint or objection was offered by the plaintiffs while the work was in progress, and no claim for forfeiture made until the work was completed. The real trouble was, that difficulty had arisen between G. H. Wilkinson (president and principal shareholder of the defendant company) and the plaintiffs about another matter, and that the plaintiffs were determined to get him and the defendants out of possession upon any pretext whatever.

(3) As to the breach of covenant not to assign or sublet without leave. Most of the repaired portion of the building is occupied

by the defendant company. The plaintiffs contend that the hotel company have not the power to carry on business as dealers in rubber goods. That claim is answered by the decision of the Privy Council in *Bonanza Creek Gold Mining Co. Limited v. The King*, [1916] 1 A.C. 566, 26 D.L.R. 273, followed in our Courts in *Edwards v. Blackmore* (1918), 42 O.L.R. 105, 42 D.L.R. 280. There must be a valid assignment to work a forfeiture: *Cornish v. Boles* (1914), 31 O.L.R. 505, at p. 519, 19 D.L.R. 447.

The mere letting into possession is not a breach of covenant not to assign or sublet: *McCallum Hill & Co. v. Imperial Bank* (1914), 30 W.L.R. 343, 22 D.L.R. 203.

The plaintiffs had given their consent to a subletting, although they contend not to this one (see letter of the 12th January, 1918—exhibit 15).

The Court always leans against forfeiture: *McLaren v. Kerr* (1876), 39 U.C.R. 507; *Hyman v. Rose*, [1912] A.C. 623.

I find nothing in the authorities cited by the plaintiffs to affect the view which I am taking of the case. They are: *Curry v. Pennock* (1913), 4 O.W.N. 712 and 1065, 10 D.L.R. 166 and 548; *Fitzgerald v. Barbour* (1908), 17 O.L.R. 254, affirmed, *sub nom. Loveless v. Fitzgerald* (1909), 42 Can. S.C.R. 254; *Holman v. Knox* (1912), 25 O.L.R. 588, 3 D.L.R. 207. Some of the views expressed by the Court in this latter case must be modified by the judgment in *Hyman v. Rose* (*ubi supra*).

The action must be dismissed with costs.

The plaintiffs appealed from the judgment of FALCONBRIDGE, C.J.K.B.

January 14, 1919. The appeal was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

D. L. McCarthy, K.C., for the appellants, argued that forfeiture should be decreed for breach of covenant to repair: *Holman v. Knox* (1912), 25 O.L.R. 588, 3 D.L.R. 207. At all events the appellants were entitled to damages for the unauthorised alterations which had been made in the building by the defendants: *Sullivan v. Doré*, 5 O.W.N. 70, at p. 72, 13 D.L.R. 910; *Hyman v. Rose*, [1912] A.C. 623. The appellants were also entitled to forfeiture on account of the defendants' breach of the covenant not to assign or sublet without leave.

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E. S. Wigle, K.C., for the defendants, respondents, contended that the alterations increased if anything the value of the building, and so no damages should be awarded. As to forfeiture, the appellants, by claiming rent after the acts of forfeiture complained of had been committed, had waived their right to forfeiture. There had been no breach of the covenant not to assign or sublet without leave: *McCallum Hill & Co. v. Imperial Bank*, 30 W.L.R. 343, 22 D.L.R. 203; *Fawcett's Landlord and Tenant*, 3rd ed., p. 422.

McCarthy, in reply, said that the appellants had at the trial abandoned their claim for rent, and again abandoned that claim here, so that there was no waiver of the right of forfeiture.

February 7, 1919. RIDDELL, J.:—The plaintiffs, the owners of the International Hotel, Windsor, bring this action (11th March, 1918) against their tenants.

They allege that in the months of January and February, 1918, the defendants altered the building in breach of covenant; and that, on the 27th February, 1918, they (the plaintiffs) served a notice in writing specifying the breach, etc., and requiring remedy of breach and compensation, that the defendants did not remedy or compensate; further, the defendants, in January and February, 1918, sublet without leave part of the premises in breach of their covenant. Then they say that on the 1st February, 1918, a month's rent became due, and on the 1st March, 1918, another month's rent, "and the same are now in arrear and remain due and unpaid."

"The plaintiffs therefore claim:—

"1. Declaration of forfeiture of said lease for reasons alleged and for possession of the said building and premises.

"2. All arrears of rent.

"3. \$500 damages for the said breaches of covenant to repair.

"4. \$500 for mesne profits.

"5. Such further and other relief as to the Court may seem proper."

The defendants say that they offered a cheque for rent due on the 1st February, 1918, which was refused; they say they are and always have been willing to pay the rent; and they bring into Court \$1,095 for the rent for February, March, and April, and ask

relief from forfeiture, if any there be. They alleged consent to the changes and the subletting, and ask relief from the forfeiture, if any. The plaintiffs reply with the general issue.

At the trial the learned Chief Justice of the King's Bench dismissed the action with costs. The plaintiffs now appeal.

The claim for forfeiture can be shortly disposed of by the consideration that in this action a claim is made for rent due on the 1st March, 1918, after all the acts upon which forfeiture is hypothecated had been committed.

There has never been any doubt that a forfeiture does not act *ipso facto*, but can be waived, and that an unequivocal act which shews a claim by the landlord of the existence of a tenancy, after the act complained of, operates as such a waiver—at least if such act be done before an unequivocal claim of forfeiture. It is needless to cite authority for this elementary proposition: *McMullen v. Vannatto* (1894), 24 O.R. 625, is a case in our own Courts. Action brought for rent accruing due after the noxious acts is such an unequivocal act, operating as a waiver. This is equally elementary; *Dendy v. Nicholl* (1858), 4 C.B.N.S. 376, has never been questioned, but has been consistently followed: *Penton v. Barnett*, [1898] 1 Q.B. 276.

Whether, when in the same action for rent forfeiture is also claimed, the action will operate as a waiver, has been doubted. But *Bevan v. Barnett* (1897), 13 Times L.R. 310, decides in the affirmative. This case has been distinguished (e.g., in *Penton v. Barnett*, *ut supra*), but not questioned, much less overruled; it recommends itself on principle and should be followed. At the least such a proceeding is evidence of a waiver, and we should in the present case hold it a waiver. The annotations in 10 D.L.R. at p. 603, appended to the report of a British Columbia case, *Balagno v. Leroy* (1913), 10 D.L.R. 601, contain an interesting and valuable discussion with cases cited.

The acts alleged as justifying forfeiture are not continuing acts so as to let in the exception, and I am of opinion that this action itself is a waiver and bars forfeiture.

If it should be contended—as it was not—that the landlords had determined to void the lease before the rent sued for accrued due, the answer is, that there was no act done unequivocally shewing that the landlords insisted upon the forfeiture until the issue of the writ; everything was still *in gremio*.

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Then it was said that the claim for rent was abandoned at the trial; but, even if that were so, the forfeiture had already been waived and could not be reinstated: *Bevan v. Barnett, ut supra*. Except before us, however, there was no abandonment of the claim for rent; what was abandoned at the trial (if anything) was any claim for forfeiture on the ground of non-payment of rent. This is what took place:—

“Mr. Fleming (counsel for the plaintiffs): The claims for forfeiture, my Lord, are based upon the subletting without our permission and also the alteration of the premises without our consent; those are the two claims.

“His Lordship: You are not claiming by reason of non-payment of rent?

“Mr. Fleming: No, we are not making that.”

“His Lordship: They are relying on the other two grounds.”

And on the plaintiffs’ agent being cross-examined:—

“Q. Wilkinson has paid you right along—a pretty respectable sort of citizen as far as you know? A. Mr. Wilkinson may have intended to pay his rent right along, he has not paid it as yet.

“Q. He paid you February and March into Court? A. We are finding no fault with that end of it.”

Mr. McCarthy, before us, did in substance abandon the claim for rent; that was of no avail, and, for reasons to be set out later, the plaintiffs should not be held to this position.

The plaintiffs, in respect of the claim for forfeiture for subletting, might be in difficulty by reason of the provisions of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 22; but it is unnecessary to pursue this, in view of the decision that the forfeiture was waived by this action.

The claim for damages, however, seems to me to be well-founded. The changes made, it is admitted, could not lawfully have been made without the consent of the plaintiffs. The plaintiffs did consent to a certain defined change, but not to the change actually made. Where a consent is given to act A, and act B is done instead, there is no consent to act B unless the differences between acts A and B are so trifling that the maxim *de minimis non curat lex* applies.

In the present instance, consent was made to change the external front of the building by making a one-store entrance

with one door—what was in fact done was to make a two-store entrance with two doors. This cannot be considered such a difference that the eye of the law cannot see it or the mind reasonably contemplate it. The defendants then are wrongdoers, and it does not help them if the fact is that the building is better thus than it would have been had they acted upon the consent. A landlord has the right to determine how his building is to look, and the tenant may not substitute his own taste and judgment for the owner's.

There are several courses open to us: we might direct the tenants to reinstate the building as it was before the change (not to the state contemplated by the consent given to change—that consent is nugatory), either at once or on the completion of the tenancy, giving security in the meantime for such reinstatement. Either course, in my view, is inadvisable. I cannot think that there would be any increase in the value of the building at all corresponding to the expense, and consequently the defendants would be penalised without corresponding advantage to the plaintiffs. The third course is to treat this as a simple common law action and give the plaintiffs damages for the wrongs complained of. This, in my view, is the best course to pursue.

I do not think that, on the evidence before us, we can make a satisfactory estimate of what these damages are. I would, however, fix them at \$200, and allow either party to take a reference at their own risk as to costs.

As to the subletting without leave, the damages would, in any event, be purely nominal, and I do not propose on a purely academic question to discuss the rather technical and intricate law governing such cases.

The only other question is as to the rent sued for.

We have seen that the claim for the recovery of the rent was not abandoned at the trial, but only the right, if any, to forfeiture based upon the non-payment of the rent. The judgment, if allowed to stand, would bar the plaintiffs from recovering the rent due on the 1st February and 1st March, 1918. The notice of appeal does not set this up as a ground of appeal, and counsel before us abandoned the claim for rent. In strictness, therefore, the plaintiffs are barred of any right to this rent. It would, however, be unjust to hold the plaintiffs strictly to their position;

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we should now allow an appeal on this point *nunc pro tunc*, and give the plaintiffs judgment for the two instalments of rent due before the issue of the writ, namely, \$730; this indulgence should not, however, entitle them to costs, rather the reverse.

As to costs: it is abundantly manifest that the real subject of the action is the forfeiture claimed; all else is subsidiary or incidental. There never was any dispute as to the rent or any refusal or disinclination to pay it; and, had the action been for the rent alone, the plaintiffs could have no costs, but should pay the costs at least subsequent to the payment into Court; the previous costs, separate from the rest of the action, are negligible.

In respect of the damages for breach of covenant etc., the plaintiffs are entitled to something, but they have failed in their main contention; and, were that the only claim, they should not, I think, either pay or receive costs.

I think, on the whole, there should be no costs down to and inclusive of the judgment at the trial.

The costs of the appeal the plaintiffs should have, if they are willing to accept the judgment barring them of the right to rent due before the action; if, however, they desire to claim this, as is most probable, they should, as a term, pay the costs of the appeal.

Assuming then acceptance of the rent, the money paid into Court will be paid out to them, less the defendants' costs of the appeal, to be taxed, which will be paid to the defendants. If neither party desires a reference, the plaintiffs will have judgment also for \$200 in full of all damages for breach of covenant sued upon, without costs; if a reference be had, the costs will be in the discretion of the Master, and judgment entered accordingly.

LATCHFORD, J., and FERGUSON, J.A., agreed with RIDDELL, J.

ROSE, J.:—The change made in the building seems to me to have been of some importance and to have been unauthorised; and I am unable to find that any resultant right of forfeiture has been waived. As has been pointed out in other cases, the report of the decision in *Bevan v. Barnett*, 13 Times L.R. 310, is not entirely satisfactory, and it does not appear to me that, upon the authority of that case alone, it ought to be held that, if a lessor sues for a declaration of forfeiture of the term, he necessarily

waives the forfeiture by coupling with his claim for that relief a claim for rent which accrued due after the forfeiture; and, if it is not, as a matter of law, necessary to hold that the inclusion of the claim for rent amounts to a waiver, it does not seem to me that in this case it ought to be found as a fact that there was a waiver: the true inference seems to me to be rather that the claims, which were made at the same time and were clearly inconsistent, were intended to be alternative—that the plaintiffs meant to say, “We ask to be put again in possession of our property, but, if we cannot have that relief, we ask for the rent.”

The majority of the Court, however, think that the plaintiffs cannot have the relief for which the action was brought, and I agree that they should have the relief suggested in the opinion read by Mr. Justice Riddell.

Appeal allowed in part.

[APPELLATE DIVISION.]

RICHARDSON v. McCaffrey.

Appeal—Order of Judge in Chambers Reversing Order of Master in Chambers Staying Reference pending Appeal to Supreme Court of Canada—Judicature Act, sec. 25—Interlocutory Order—Leave to Appeal not Given—Supreme Court Act, sec. 76—Effect of.

An order was made by the Master in Chambers staying the proceedings upon a reference directed by the judgment in the action pending an appeal by the defendant to the Supreme Court of Canada. The order was reversed, upon appeal, by a Judge in Chambers. The defendant appealed from the reversing order:—

Held, that that order was an interlocutory one within the meaning of sec. 25 of the Judicature Act, R.S.O. 1914, ch. 56; and, leave to appeal from it not having been obtained, the appeal was not competent.

Stewart v. Royds (1904), 118 L.T. Jour. 176, and *Gibson v. Hawes* (1911), 24 O.L.R. 543, approved and followed.

If there was any doubt as to the order being interlocutory, the Court should determine that it was interlocutory: sub-sec. 2 of sec. 25.

Quære, as to the effect of sec. 76 of the Supreme Court Act, R.S.C. 1906, ch. 139, in regard to a stay of proceedings upon the perfecting of the security required by sec. 75.

An appeal by the defendant from an order of MEREDITH, C.J.C.P., in Chambers, reversing an order of the Master in Chambers whereby the proceedings upon a reference were stayed pending an appeal by the defendant to the Supreme Court of Canada.

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The action was for foreclosure, and the judgment was the usual foreclosure judgment.

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McCAFFREY.

January 31. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

H. J. Scott, K.C., for the appellant, argued that under the Supreme Court Act, R.S.C. 1906, ch. 139, sec. 76, the appellant had an absolute right to the relief asked. [MEREDITH, C.J.O.:—Clause (d) of the section seems to stand in your way.] Halsbury's Laws of England, vol. 14, para. 3, shews that the judgment in this case is not such as should be enforceable by execution. A judgment directing a reference is different from a judgment awarding the recovery of a specific sum. He referred to *Monro v. Toronto R.W. Co.* (1902), 5 O.L.R. 15, 20, which was decided under Rules which are practically identical with those now in force. Apart from the appellant's contention that he is absolutely entitled to a stay of proceedings, it is submitted that this relief should be granted as a matter of discretion, as the valuations of the property shew that the plaintiffs are perfectly secured from suffering any loss by reason of the stay of proceedings. Reference was made to *Saskatchewan Land and Homestead Co. v. Moore* (1914), 6 O.W.N. 262, and *Davison v. Forbes* (1916), 10 O.W.N. 358, 398. [MEREDITH, C.J.O., questioned whether the appeal was competent, if the order appealed from was interlocutory.]

A. C. Heighington, for the respondents, the plaintiffs, argued that the order was interlocutory (Judicature Act, sec. 25), and if there was any doubt on the point, the Court should rule that it was so (sub-sec. 2). He referred to Holmsted's Judicature Act, 4th ed., p. 117; *Stewart v. Royds* (1904), 118 L.T. Jour. 176. The respondents' case comes within both (c) and (d) in sec. 76. The *Monro* case is distinguished by Middleton, J., in the *Saskatchewan* case, *supra*. The Judge in Chambers exercised his discretion in this case, and it should not be interfered with: see *Sharpe v. White* (1910), 20 O.L.R. 575.

Scott, in reply.

February 10. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the defendant from an order of the Chief Justice of the Common Pleas, dated the 19th

December, 1918, reversing an order of the Master in Chambers, dated the 2nd day of that month, staying proceedings under the reference directed by the judgment, pending an appeal by the appellant to the Supreme Court of Canada.

The action is for foreclosure, and the judgment is the usual foreclosure judgment.

The contention of the appellant is, that the effect of sec. 76 of the Supreme Court Act, R.S.C. 1906, ch. 139,* is automatically to stay proceedings in the action after security for costs has been allowed; and, if that is not the case, the Court, in the exercise of its discretion, ought to stay the proceedings until the appeal to the Supreme Court of Canada has been heard and determined.

The preliminary objection is taken by the respondents that the order appealed from is an interlocutory order, and that, leave to appeal from it not having been obtained, the appeal is not competent.

We think that this objection is well taken, and that the order appealed from is an interlocutory order within the meaning of sec. 25 of the Judicature Act, R.S.O. 1914, ch. 56†: Holmested's Judicature Act, 4th ed., p. 117, and cases there cited.

An order for security for costs which directed that if security should not be given within the time limited the action should be dismissed, was held by the Court of Appeal to be an interlocutory order: *Stewart v. Royds*, 118 L.T. Jour. 176; and, if such an order be an interlocutory one, I see no reason why an order refusing to stay proceedings pending an appeal is not interlocutory. Reference may also be made to *Gibson v. Hawes* (1911), 24 O.L.R. 543, in which it was held by a Divisional Court that an order staying all proceedings in the action until after the disposition of an action in the High Court, was an interlocutory order.

*Section 75 of the Act provides that "no appeal shall be allowed until the appellant has given proper security to the extent of \$500, . . . that he will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court."

Section 76 provides that, "upon the perfecting of such security, execution shall be stayed in the original cause," subject to certain provisoes.

†25.—(1) There shall be no appeal to a Divisional Court from an interlocutory order of the High Court Division, whether made in Court or Chambers, where before the Ontario Judicature Act, 1881, there would have been no relief from a like order by an application to a superior court.

(2) Any doubt which may arise as to what orders are interlocutory shall be determined by the Divisional Court.

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If there was any doubt as to the order in question being an interlocutory one, we should exercise the power conferred upon the Court by sub-sec. 2 of sec. 25 and determine that it is an interlocutory order.

If Mr. Scott's contention as to the effect of sec. 76 of the Supreme Court Act is well-founded, I doubt whether an order to stay was necessary, and it may yet be open to the appellant to invoke the section upon the reference; and if the officer to whom the reference is directed decides to proceed with the reference, to apply for a direction to him to refrain from so doing until the appeal to the Supreme Court of Canada is heard and determined.

As bearing upon the question as to the effect of the section, reference may be made to what was said by Bankes, L.J., in *In re Weatherley*, [1918] W.N. 366, at p. 367. I must, however, not be understood to express any opinion as to the effect of the section; and it may be that, even if Mr. Scott is right, the order appealed from, being unreversed, will be an answer to any such application as I have mentioned.

The appeal must be dismissed as incompetent, and I see no reason why the costs here and below should not follow the result; and I would so direct.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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Feb. 10.

WADE v. JAMES.

Assignments and Preferences—Assignment for Benefit of Creditors—Purchase by Creditor and Inspector of Assets of Estate—Resale to Wives of Insolvents—Consideration—Amount Paid by Creditor plus Amount of his Claim—Fraud upon Estate—Account of Profits—Illegality of Transaction—Public Policy—Promissory Notes Made by Wives of Insolvents—Answer to Action for Balance Due upon Notes.

The plaintiff was the assignee of the insolvent estate of K. Brothers for the benefit of their creditors; J., one of the defendants, who were creditors of the estate, was an inspector of the estate; he purchased from the plaintiff, for \$3,587, the assets of the estate, and turned them over to the wives of the insolvents, getting from them \$1,500 in cash and four promissory notes, each for \$1,000. The \$5,500 appeared to have been made up of the \$3,587 and the amount of the indebtedness of the insolvents to the defendants, less the amount which the defendants expected to receive in dividends. The purchase and resale were made in pursuance of an arrangement between the wives of the insolvents and J. By the judgment in this action, the Master was directed to take an account "of the profits, if any, made or to be made by the defendants out of the purchase of the insolvent estate." The whole of the amount of the promissory notes had not been paid; the Master found that there was still due upon them upwards of \$1,739.25, and that for that sum and interest, as such "profits," the defendants were liable:—

Held, that the real transaction was a fraud upon the estate, to which the wives of the insolvents were parties; the defendants could not, by reason of the illegality of the transaction, recover the balance remaining due upon the promissory notes; and, therefore, that balance was not "profits made or to be made," within the meaning of the judgment.

Although the general rule is, that a person cannot set up the illegality of a transaction to which he was a party, he may, on grounds of public policy, do so in such a case as this.

The order of MASTEN, J., 43 O.L.R. 614, dismissing the defendants' appeal from the Master's report, was reversed, and the report of the Master varied by deducting from the amount found due by the defendants the sum of \$1,739.25 and interest.

AN appeal by the defendants from the order of MASTEN, J., 43 O.L.R. 614.

January 27. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

I. F. Hellmuth, K.C., for the appellants, disputed the right of the plaintiff to interest. He also urged that at the time of the judgment the appellants had made no profit out of the sale. The point is very like that which was raised in *Grant v. Gold Exploration and Development Syndicate Limited*, [1900] 1 Q.B. 233. He also referred to *Hochberger v. Rittenberg* (1916), 36 D.L.R. 450, at p. 452, *per* Fitzpatrick, C.J.O., and at p. 453, *per* Idington, J., citing *Malins, V.-C.*, in *McKewan v. Sanderson* (1873), L.R. 15 Eq. 229,

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234. The learned Judge in the Court below misconceived the case in thinking that it was a question of the solvency of the purchasers.

A. C. McMaster, for the respondent, the plaintiff, referred to *Day v. Day* (1889), 17 A.R. 157, *per* Hagarty, C.J.O., at p. 160, and argued that the *Hochberger* case did not apply here. He also referred to *Segsworth v. Anderson* (1893), 23 O.R. 573, reversed in *S.C.* (1894), 21 A.R. 242, restored in *S.C.* (1895), 24 Can. S.C.R. 699, as being very similar to the case at bar; *Farmers' Mart Limited v. Milne*, [1915] A.C. 106, *per* Lord Dunedin, at p. 114, citing *Mellor, J.*, in *Taylor v. Chester* (1869), L.R. 4 Q.B. 309, 314; *Wild v. Tucker*, [1914] 3 K.B. 36; *In re Gallard*, [1897] 2 Q.B. 8; *Pittsburg Carbon Co. v. McMillin* (1890), 119 N.Y. 46; *Shaw v. Jeffery* (1860), 13 Moo. P.C. 432, especially at p. 455.

Hellmuth, in reply, argued that the *McMillin* case was an authority in his favour. The whole transaction was against public policy.

February 10. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the defendants from an order of Masten, J., dated the 16th October, 1918, dismissing an appeal from the report of the Master in Ordinary, dated the 17th May, 1918, made in pursuance of the order of reference directed by the judgment at the trial, dated the 28th February, 1918.

By the judgment at the trial it was referred to the Master in Ordinary to take an account “of the profits, if any, made or to be made by the defendants out of the purchase of the insolvent estate in question;” and it was ordered that “the amount thus found due by the defendants to the plaintiff should be paid forthwith after confirmation of the Master’s report.”

The purchase referred to in the judgment was a purchase by the appellant James, for \$3,587, of the assets of Krieger Brothers, who had made an assignment of their estate for the benefit of their creditors to the respondent.

James was an inspector of the estate, and this transaction was attacked on the ground that, being an inspector, he was disqualified from being a purchaser, and one of the objects of the action was to compel the appellants to account for the profits made out of the purchase.

It appears from the evidence taken in the Master's office that the purchase was made in pursuance of an arrangement entered into between the wives of the insolvents and James that he should purchase the assets for them, and that they should repay him the purchase-price and in addition should pay the balance of the indebtedness of the insolvents to the appellants, less the amount of the dividends which they should receive.

That arrangement was carried out. James purchased for \$3,587, turned over the assets to the wives of the Kriegers, and got from them \$1,500 in cash and four promissory notes, each for \$1,000. The \$5,500 appears to have been made up of the \$3,587 and the amount of the indebtedness of the insolvents to the appellants, \$1,877—deducting \$464, which was the amount which it was estimated would be received in dividends.

The whole of the amount of the promissory notes has not been paid. After deducting payments there is still due on them upwards of \$1,739.25, and for that sum with interest on it from the 28th June, 1916, the Master has reported that the appellants are liable, as "profits made or to be made by the appellants out of the purchase of the insolvent estate in question."

There is no doubt, I think, that, if the transaction had been simply a sale to James and a resale by him to the wives of the Kriegers, the Master's finding would have been right; for it is clear, upon the evidence, that when the notes fell due the makers were solvent and the amount due on the promissory notes might have been collected; but that was not, as I have said, the nature of the transaction that was entered into.

The real transaction was a fraud upon the estate, to which the wives of the Kriegers were parties; and the position taken by the appellants is, that they could not, by reason of the illegality of the transaction, recover the balance remaining due on the promissory notes; and that, therefore, that balance is not profits made or to be made, within the meaning of the judgment. In my opinion, that position is well taken.

Although the general rule is, that a person cannot set up the illegality of a transaction to which he was a party, he may, on grounds of public policy, in a case such as this, set up the illegality of the transaction.

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It was contended that that question had been determined adversely to the appellants by the trial Judge. It is true that some observations were made by him which seem to indicate that he thought that the general rule to which I have referred precluded the wives of the Kriegers from setting up as a defence to an action on the promissory notes the illegality of the transaction of which the making of them formed part, but there was no determination of the question, and the question is left quite open by the judgment. If, as the respondent contends, that question had been decided adversely to the appellants, the judgment should have contained a declaration to that effect; and I do not see, if it had been the case, why any reference was directed. There was no dispute as to the amount owing on the promissory notes, and one would have thought that the judgment would have simply directed payment of that balance.

It may be that the relief to which the respondent was entitled was a judgment against the appellants for the amount by which the sum which the appellants were to receive for the assets exceeded what was paid to the assignee for them, but that is not the relief which was awarded by the judgment.

In coming to my conclusion, I do not differ from my brother Masten, for his decision proceeded upon the hypothesis that there was simply a sale by the respondent to James, and a sale by him to the wives of the Kriegers; but that was not, in my opinion, the real nature of the transaction that was entered into.

I would, for these reasons, reverse the order appealed from and substitute for it an order varying the report of the Master by deducting from the amount found due by the appellants the sum of \$1,739.25 and the interest upon that sum, amounting to \$163.17.

The case is, however, one in which the parties may properly be left to bear their own costs of the appeal to my brother Masten and of this appeal.

Appeal allowed.

[APPELLATE DIVISION.]

COWAN V. FERGUSON.

1918

June 26

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Injunction—Breach of Covenant—Restriction upon Use of Land—Erection and Maintenance of Foundry—Covenant Made in 1842—Obsolete Restriction—Change of Circumstances—Steam and Electrical Power Used instead of Water-power—Acquiescence in Erection of Foundry.

Where, after the entering into of a covenant restricting the use to which the land comprised in a building scheme may be put, there has been a general change in the character of the neighbourhood, the Court will not enforce the covenant.

This principle was applied in a case where the plaintiffs sought to restrain the defendant from maintaining a foundry upon land said to be subject to a covenant contained in an agreement made in 1842, by which D., the then owner of the lands now owned by the plaintiffs and defendant respectively, covenanted with F., the plaintiffs' predecessor in title, his heirs and assigns, that in sales and agreements for sale by D. or his heirs or assigns of water-lots or lots in the village of G., with the privilege of using water-power thereon, there should be inserted in every such conveyance and agreement a clause restraining and prohibiting the purchaser from carrying on the business of a foundry on the land sold or agreed to be sold to him—the circumstances had changed, the village had become a thriving industrial city, and steam and electrical power had to a large extent replaced water-power. And the principle was applicable notwithstanding that the plaintiffs and their predecessors had not been parties to making the changes.

Sobey v. Sainsbury, [1913] 2 Ch. 513, approved and applied.

It was also *held*, that the plaintiffs had acquiesced in the erection by the defendant of a building to be used as a foundry.

Judgment of LATCHFORD, J., affirmed.

ACTION by the owners of land in the city of Galt to restrain the defendant, the owner of neighbouring land, from erecting upon her land any building for a foundry and from carrying on upon her land the business of a foundry, and for damages.

April 18 and 19, 1918. The action was tried by LATCHFORD, J., without a jury, at Kitchener.

Gideon Grant and *J. B. Dalzell*, for the plaintiffs.

M. A. Secord, K.C., for the defendant.

June 26, 1918. LATCHFORD, J.:—The plaintiffs are manufacturers of wood-working machinery in the city of Galt, and, as an incident to their business, and only for their own requirements, maintain an iron foundry. From the Hon. Robert Dickson, who, in 1842, owned a large area of land in Galt, they have acquired, through one N. D. Fisher and others, a title in fee simple to lots 8a and 8b as shewn on a plan prepared for Mr. Dickson.

Latchford, J.

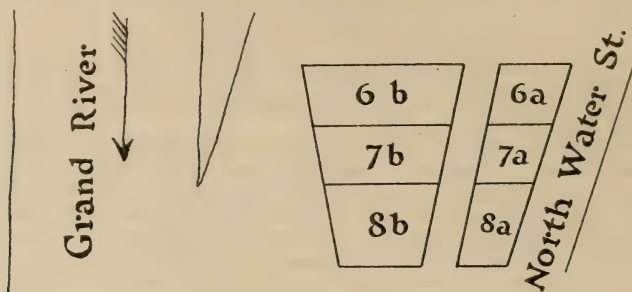
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The defendant is an iron-founder, who, through many mesne conveyances, has become the owner in fee of lots 6a and 6b and 7a and 7b as shewn on the same plan. The root of her title, like that of the plaintiffs, is in Dickson. The relation of the properties of the parties may be made clear by a diagram:—



The defendant does not in any way enter into competition with the plaintiffs; and the business which she carries on causes no appreciable damage to the plaintiffs—not even, as I find, increasing their fire-risk or their insurance-rates.

The plaintiffs seek in this action an injunction restraining the defendant from carrying on the business of a foundry, and, in addition, damages.

After the plaintiffs knew the purpose to which the defendant intended to devote her property, they not only made no objection, but actually encouraged the defendant in establishing her foundry. There is no merit whatever in the plaintiffs' action. They base it wholly upon a restriction to which Dickson wished to subject purchasers from him of the lands in question and other lands further north, which were served, like the properties of the parties, by an hydraulic canal which Dickson had constructed.

It is undoubted that a restriction was imposed in 1842 upon the predecessors in title of the parties, that only one foundry should be carried on upon the lots served by the canal. At the time no power except that of water was in use, ordinarily, in Upper Canada. Dickson's intention was, it would seem, to prevent competition among the lessees from him of the power which he had made available.

The restriction was contained in a form of agreement, which was not registered; and the defendant is, I think, a purchaser for value without notice of such restriction.

Since 1842, conditions have so changed in this Province that the object of the restriction cannot be attained. As in *Sobey v. Sainsbury*, [1913] 2 Ch. 513, to give effect to the plaintiffs' contention would be to perpetuate, far beyond the real intention of the original contracting parties, restrictions which by the course of time have become obsolete and meaningless. The plaintiffs may not be actuated by mere caprice, or by a desire to make money out of a possible breach by the defendant of technical and obsolete restrictions; but, in the altered state of circumstances, the enterprise of the defendant should not be prohibited at the instance of persons who have not sustained and are never likely to sustain damage by what the defendant has done.

In my opinion the action fails, and it is dismissed with costs.

The plaintiffs appealed from the judgment of LATCHFORD, J.

November 5, 1918. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

R. McKay, K.C., and *Gideon Grant*, for the appellants, the plaintiffs, referred to *Israel v. Leith* (1890), 20 O.R. 361, and cited the head-note in support of the proposition that registration of an easement on the lot conveyed is notice thereof to a subsequent purchaser of the adjacent lot without registration thereon. [MEREDITH, C.J.O., thought the doctrine stated in the head-note was a mere dictum, and not necessary to the decision of the case.] Reference was made to *McLean v. McKay* (1873), L.R. 5 P.C. 327; *Tulk v. Moxhay* (1848), 18 L.J.N.S. Ch. 83, 2 Ph. 774, a case often cited: see *Millbourn v. Lyons*, [1914] 2 Ch. 231; *Rogers v. Hosegood*, [1900] 2 Ch. 388, 403. [HODGINS, J.A., thought that Mr. Armour, in his work on Titles, had viewed the *Israel* case in the same light as counsel for the appellants; but *quære*, was it not a mere dictum, as suggested by the Chief Justice?] They also referred to *In re Nisbet & Potts' Contract*, [1906] 1 Ch. 386; *Osborne v. Bradley*, [1903] 2 Ch. 446; *Richards v. Revitt* (1877), 7 Ch.D. 224; the leading case of *Renals v. Cowlishaw* (1878), 9 Ch.D. 125, 129, and (1879) 11 Ch.D. 866, 869. The *Renals* case was approved in *Spicer v. Martin* (1888), 14 App. Cas. 12, 23, 24, 25. See Halsbury's Laws of England, vol. 25, p. 455, para. 828. They also referred to *Van Koughnet v. Denison* (1885), 11 A.R. 699; *Pearson*

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v. *Adams* (1912-14), 27 O.L.R. 87, 7 D.L.R. 139, 28 O.L.R. 154, 12 D.L.R. 227, 50 Can. S.C.R. 204; *Re Lorne Park* (1913-14), 30 O.L.R. 289, 18 D.L.R. 595, 33 O.L.R. 51, 22 D.L.R. 350. The learned trial Judge relied on *Sobey v. Sainsbury*, [1913] 2 Ch. 513, but that case is not an authority for the proposition that you can dispose of a covenant on such a ground. It differs in its circumstances from the case at bar. The appellants had nothing to do with the changes that had been made. [MAGEE, J.A., referred to *Sayers v. Collyer* (1884), 28 Ch.D. 103, at p. 108, where *Duke of Bedford v. Trustees of the British Museum* (1822), 2 My. & K. 552, is cited.] There is no question of estoppel here, as the plaintiffs gave notice to the defendant, as soon as they knew of their rights. *Re Hunt and Bell* (1915), 34 O.L.R. 256, 24 D.L.R. 590, and *London and South Western R.W. Co. v. Gomm* (1882), 20 Ch.D. 562, were also cited. It is no answer, in a case like this, to say that the privilege claimed has become obsolete. It is not a case of a common advantage, but of a right peculiar to the appellants.

M. A. Secord, K.C., for the respondent, the defendant, argued that the agreement in respect of which the action was brought had lapsed, and quoted the judgment of Cozens-Hardy, M.R., in the *Millbourn* case, *supra*, pp. 236 *et seq.*, to shew that the alleged agreement did not run with the land. All that you can look at is the covenant in the body of the deed, and any notice with which the respondent could be affected would be constructive only: see *Foster v. Beall* (1868), 15 Gr. 244; *Dawes v. Tredwell* (1881), 18 Ch. D. 354. [MEREDITH, C.J.O., referred to *Carter v. Williams* (1870), L.R. 9 Eq. 678.] Counsel referred to *Re Montgomery and Miller* (1918), 13 O.W.N. 399, and said that it would be most inequitable to grant the injunction prayed for. The appellants should (if entitled to any relief) be confined to damages. The trial Judge found that they were consenting parties to the erection of the respondent's foundry. The respondent was not carrying on a general foundry business, and so was not in competition with the appellants. Reference was made to *Reid v. Bickerstaff*, [1909] 2 Ch. 305.

McKay, in reply, argued that the agreement and indenture formed but one instrument, being contemporaneous in date. The *Carter* case was distinguishable.

February 10, 1919. The judgment of the Court was read by MEREDITH, C.J.O.:—The appellants are the owners of two lots on the hydraulic canal in the city of Galt, being lots 8a and 8b as shewn on a plan prepared by Deputy Surveyor Kerr in or about the month of February, 1842, and the respondent is the owner of lots 6a and 6b and 7a and 7b according to the same plan.

The action is brought to restrain the respondent from erecting any building for a foundry and from carrying on the business of a foundry on her lots.

The right to this relief is based upon a covenant contained in an agreement between Robert Dickson, the then owner of these and other lots, and one Fisher, dated the 15th February, 1842, by which Dickson covenanted with Fisher, his heirs and assigns, that in sales and agreements for sale by Dickson or his heirs or assigns of water-lots or lots of land in the village of Galt, with the privilege of using water-power thereon, there should be inserted in the instrument or instruments evidencing such sale or agreement for sale, a clause restraining and prohibiting "such purchaser or purchasers or person or persons from carrying on the business of a foundry on the land so sold or agreed to be sold to him or them as aforesaid."

The title of the appellants is derived through Fisher and the title of the respondent through William Boyce, to whom the devisees in trust under the will of Dickson, on the 27th February, 1849, conveyed lots 7a and 7b (described in the conveyance as lot 7), and to lots 6a and 6b through James Blain, who derived title from Dickson.

In the view I take, it is unnecessary to consider the question whether the respondent is bound by the covenant which Dickson entered into with Fisher, or the question whether the appellants are entitled to the benefit of it.

When the covenant was entered into, Galt was a small country village, and water-power was that used in manufacturing industries. Galt has now become a thriving industrial city, having within its limits many manufacturing establishments, and steam and electrical power have to a very large extent replaced water-power.

When Fisher purchased from Dickson and established his foundry business, it was, no doubt, important to him that he should not be subjected to the competition of other foundries; and

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the covenant was, doubtless, entered into for the purpose of protecting him from such competition by persons who should thereafter purchase Dickson's lots on the canal.

The case is, therefore, one, I think, for the application of the principle which my brother Latchford applied—that where, after the entering into of a covenant restricting the use to which the land comprised in a building scheme may be put, there has been a general change in the character of the neighbourhood, the Court will not enforce the covenant.

Dealing with this principle, Sargant, J., said in *Sobey v. Sainsbury*, [1913] 2 Ch. 513, 529, 530, referring to *German v. Chapman* (1877), 7 Ch. D. 271, and *Knight v. Simmonds*, [1896] 2 Ch. 297:—

“The effect would, but for the principles applied in the cases I have referred to, have been to stereotype and perpetuate, far beyond the real intention of the contracting parties, and to the prejudice of successive generations, restrictions which had in the course of time become obsolete and meaningless. And, having regard to the great number of persons who in the case of building schemes may be originally entitled to enforce these covenants, it would, I think, be an undue limitation of the discretion of the Court to refuse specific performance of the covenant if the refusal should be restricted to cases where there was some personal or individual default on the part of the plaintiff or his predecessors in title. This might easily result in the enforcement of such restrictions after long intervals of time and under totally changed conditions from motives of spite or caprice, or from a desire to make money out of the relaxation of technical but obsolete restrictions. And it is for reasons of this kind that I understand James, L.J., and Lindley, L.J.,* to have carefully stated that the Court may refuse to specifically enforce such obligations in an altered state of circumstances: ‘Whatever the explanation of the altered state of things may be.’”

While the change of circumstances in the case at bar differs from those which had taken place in the case just referred to, the principle enunciated by Sargant, J., is equally applicable.

It was contended by counsel for the appellants that this principle was applicable only when the party seeking to enforce the covenant or his predecessor in title had been a party to making the changes; but the contrary is emphatically stated by Sargant,

*In the *German* and *Knight* cases, *supra*.

J., in the passage from his judgment which I have quoted, and the observations of James, L.J., and Lindley, L.J., support his view, for they speak of the doctrine applied by Sargant, J., as being applicable not only where the changes have been permitted or acquiesced in, but also where they are the result of "a long chain of things."

The judgment of my brother Latchford may also, I think, be supported upon the ground that the appellants, knowing that the respondent was erecting a building to be used as a foundry, acquiesced in what she was doing and even made suggestions as to the mode of constructing part of the building.

It is, besides, conceded that the appellants have not sustained and will not in the future sustain any injury from the use to which the respondent has put her property.

For these reasons, in my opinion the case is not one in which the Court should interfere to enforce the covenant; and I would affirm the judgment and dismiss the appeal with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

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Street Railway—Injury to Passenger Alighting from Car—Invitation to Alight while Car Moving—Opening of Exit-door before Stopping Place Reached—Negligence—Question whether Motion Perceptible to Reasonably Careful Passenger—Question for Jury—Nonsuit Set aside and New Trial Directed—Evidence—Statement of Conductor Made Immediately after Accident—Inadmissibility.

The plaintiff, a passenger in a street-car of the defendants, signalled the conductor to stop the car so that he might alight. The exit-door was opened before the car had actually stopped; and the plaintiff, relying, as he said, upon the opening of the door as an invitation to alight, stepped on the pavement, and, owing to the motion of the car, was thrown down and injured. He thought the car must have been travelling at about 5 miles an hour; he did not look to see whether the car was in motion, and admitted that if he had looked he would probably have noticed that it was. In an action for damages for the injury sustained, he testified accordingly, and no other evidence was offered on his behalf. The trial Judge, being of opinion that there was no evidence of negligence to go to the jury, dismissed the action:—

Held, that, the door being opened when the car was not at a stopping place, the question was, whether the car was moving so fast that the motion would be perceptible to any reasonably careful passenger; that was a question for the jury; and there should be a new trial (RIDDELL, J., dissenting).

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Per RIDDELL, J.:—A car moving at the rate of 5 miles an hour was going so fast that the motion must have been perceptible to any reasonably careful passenger.

Gazey v. Toronto R. W. Co. (1917), 40 O.L.R. 449, and *Grand Trunk R.W. Co. v. Mayne* (1917), 56 Can. S.C.R. 95, applied.

It was said that, immediately after the plaintiff had fallen, the conductor alighted and helped him to his feet, and said: "It was my fault, I should not have opened the door, but I thought the car had stopped:"—

Held, that evidence of this statement was properly excluded: it was not a statement by an agent which would bind his principal, nor was it part of the *res gestæ*.

Regina v. McMahon (1889), 18 O.R. 502, *Wilson v. Botsford-Jenks Co.* (1902), 1 O.W.R. 101, and *Garner v. Township of Stamford* (1903), 7 O.L.R. 50, referred to.

THE following statement of the facts is taken from the judgment of MIDDLETON, J.:—

Appeal by the plaintiff from the judgment of ROSE, J., pronounced at the trial, dismissing the action at the close of the plaintiff's case, on the ground that there was no evidence of negligence to go to the jury.

The plaintiff was a passenger on a car of the defendants, going eastward upon Dundas street. Nearing the place where he intended to alight, he signalled the conductor to stop the car so that he might alight. He complains that the exit-door of the car was opened before the car had actually stopped; and that, relying upon the opening of the door as being in the circumstances an invitation to alight, he stepped on the pavement, and, owing to the motion of the car, was thrown down and injured. The place where the plaintiff attempted to alight and fell was about 100 feet before the stopping place was reached. The only evidence was the story of the plaintiff himself. After giving the signal, he says, he went to the back of the car, to the exit-door; he stood for a short time, and the conductor then opened the door, and the plaintiff immediately stepped out. He admits that, if he had looked before stepping out, he probably would have noticed that the car was in motion; he did not look; but, upon the opening of the door, at once stepped out. From the way in which he fell, he thinks that the car must have been travelling at about 5 miles per hour.

February 6. The appeal was heard by BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

R. G. Fisher and *W. G. R. Bartram*, for the appellant, argued that the case should have been left to the jury. There was a question of fact to be tried, namely, whether the car was obviously

travelling so fast that a reasonably careful man would not have stepped out of it (a pay-as-you-enter car) when the door had been opened by the conductor to permit of his alighting: *Edgar v. Northern R.W. Co.* (1884), 11 A.R. 452; *Armstrong Cartage and Warehouse Co. v. Grand Trunk R.W. Co.* (1918), 42 O.L.R. 660, 43 D.L.R. 122. Counsel admitted that the mere opening of a car-door would not be in itself an invitation to alight: *Mayne v. Grand Trunk R.W. Co.* (1917), 39 O.L.R. 1, 34 D.L.R. 644. But, in the circumstances of the present case, it was. This case was distinguishable from *Gazey v. Toronto R.W. Co.* (1917), 40 O.L.R. 449, 38 D.L.R. 637, in that there the rate of speed was greater, so great that no reasonably careful person would have attempted to alight. Counsel also asked for a new trial on the ground of the improper rejection of evidence, contending that a statement alleged to have been made by the conductor immediately after the accident should have been admitted as part of the *res gestæ*: *Hermes v. Chicago and Northwestern R.W. Co.* (1891), 80 Wis. 590; Phipson's Law of Evidence, 5th ed., p. 238.

J. M. McEvoy and *R. H. G. Ivey*, for the defendants, respondents, contended that there was nothing to go to the jury. The case was entirely covered by the *Gazey* case. A car running at 5 miles an hour was obviously going so fast as to negative, in the eyes of a reasonably careful person, any invitation to alight which might be presumed from the opening of the car-door by the conductor.

[The Court intimated that counsel for the respondents need not answer the argument as to the improper rejection of evidence.]

Fisher, in reply.

February 7. MIDDLETON, J. (after stating the facts as above):—The trial Judge dealt with the case upon what he took to be the view of the Divisional Court in the case of *Gazey v. Toronto R.W. Co.* (October, 1917), 40 O.L.R. 449, 38 D.L.R. 637, and the decision of the Supreme Court of Canada in *Grand Trunk R.W. Co. v. Mayne* (November, 1917), 56 Can. S.C.R. 95, 39 D.L.R. 691. He says: "The *Gazey* case seems to be a clear authority for the statement that to open the door of a car running or obviously running at such a rate as that" (5 miles per hour) "is not evidence of an invitation to alight;" and, there being no other evidence, he dismisses the action.

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In the case in the Supreme Court of Canada, the car was an ordinary railway car. The car-door opened upon an outside platform, and there was beyond this a vestibule door, closed when the train was under way. The deceased and his party were the only passengers intending to alight at a way-station; the conductor had warned them that the station was near, and had opened the vestibule-door and car-door to enable the deceased and his party to alight upon the arrival at the station. The train was still going at 25 miles per hour. The holding of the majority was that all that was done was in preparation for the arrival at the station, and was not, in the circumstances of the case, an invitation to alight while the train was yet in motion and before it reached the station.

In the *Gazey* case, a verdict for the plaintiff was upheld where the motorman opened the exit-door of the car while in motion, but the car "was in fact moving so slowly that the movement was not readily noticeable; the jury have concluded that, under the circumstances, the plaintiff acted reasonably, carefully, and with ordinary prudence in stepping off the car at the place where and when she did, and that, the car having arrived at the stopping place, and the plaintiff having, to the knowledge of the motorman, come to the door for the purpose of alighting there, it was negligent of the motorman to open the door of the car when the car was moving so slowly as probably to deceive the plaintiff into the belief that it was actually stopped, and by his very act of opening the door strengthening that belief and creating in the plaintiff's mind a belief that she should alight and might do so with safety" (40 O.L.R. at pp. 459, 460).

Of course this case is not on all fours with the *Gazey* case; but that case is certainly not an authority warranting a dismissal of the action. In the very careful judgment of Mr. Justice Ferguson all the cases upon the subject are reviewed, and he states his view, based upon these authorities (p. 459) "that the opening of the door of a standing train or street-car, at a regular stopping place, is *prima facie* an invitation to alight, but that opening it when the train or car is not at a stopping place and is moving so fast that the motion is perceptible to any reasonably careful passenger is not, without more, an invitation to alight; that opening it at a stopping place and slowing down the train or car is some evidence to go to the jury of an invitation to alight; that circumstances alter cases,

and that each case of these kinds must depend on its own circumstances."

Seeking to apply the principle so laid down, this case would fall in the intermediate class: the door was opened when the car was not at a stopping place; and the question to be solved is, whether it was moving so fast that the motion would be perceptible to any reasonably careful passenger. This apparent motion would negative the invitation to alight which might be implied from the opening of the door. This question, it appears to me, was one for the jury. I do not say that there cannot be a case in which the motion must obviously be so apparent that no reasonably careful passenger would think of alighting; but, in the circumstances here disclosed, it is, to my mind, a question of fact to be passed upon by the jury and one that cannot be summarily dealt with by the Judge.

Care must be taken in all these cases to avoid dangerous generalisations. There is a wide difference between the opening of an exit-door upon a train constructed and operated in the manner of carriages on English railways by a guard approaching the car from outside, and the opening of a door leading upon a platform, which might be a mere preparation for the approach to a railway station. For the same reason, the opening of an exit-door permitting the passenger to alight immediately upon the highway, in the style of cars known as "Pay-as-you-enter" cars, would be of far greater significance as an invitation to alight than the opening of a door leading upon a platform as in an ordinary car; particularly would this be so if it could be shewn that the rules of the company required that the door should not be opened so as to permit of the passenger alighting until the car was at a standstill.

For these reasons, I think that there should be a new trial, and that the costs of the former trial and of this appeal should be £to the plaintiff in the cause.

Upon the argument, an objection to the ruling of the trial Judge excluding evidence as to statements made by the conductor immediately after the accident, was dealt with. To avoid confusion in the event of a further trial, I think it important to explain the reasons for our decision. It was said that, immediately after the plaintiff had fallen, the conductor alighted and helped him to his feet, and that then a conversation took place in which the con-

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ductor said: "It was my fault, I should not have opened the door, but I thought the car had stopped." The conductor was clearly not a person whose statement would bind the company; he was not the agent of the company for the purpose of making any admissions. His statement, if it be admissible in evidence at all, should only be received upon the ground that it formed part of the *res gestæ*; and it must be borne in mind that, if it could be received when tendered by the plaintiff, it would be equally admissible if tendered by the defendants. If, instead of the statement said to have been made, the conductor had thrown the whole blame upon the plaintiff, his counsel would more readily appreciate the injustice of allowing his unsworn statement to be admitted in evidence. The truth is that the statement said to have been made by the conductor formed no part of the *res gestæ*, it was a mere narrative or discussion anent a thing then past. The principle upon which such evidence can be admitted is clearly stated in *Garner v. Township of Stamford* (1903), 7 O.L.R. 50: to make the statement admissible, it must be an involuntary and contemporaneous exclamation made without time for reflection; it is because the statement is involuntary and contemporaneous that it is received. These characteristics are supposed to import some indication of its veracity.

If the plaintiff really desires to rely upon the statements made by the conductor, he can be called; and, if he does not now admit having made the statement, evidence may be given attacking his veracity in this respect.

BRITTON and LATCHFORD, JJ., agreed with MIDDLETON, J.

RIDDELL, J.:—This is an appeal by the plaintiff from the judgment of Mr. Justice Rose, at the trial, dismissing the action.

The plaintiff, riding on a car on the London Street Railway, was approaching his stopping place and signalled the conductor to stop the car. The conductor did so and opened the exit-door while the car was in motion. The plaintiff could easily see, had he looked, that the car was moving, and it had not yet reached its ordinary stopping place, but he, as he says, without looking, stepped out and fell. The car was moving, as he thinks, at about 5 miles an hour. My learned brother dismissed the action, and I think he was right in so doing.

The case of *Grand Trunk R.W. Co. v. Mayne*, 56 Can. S.C.R. 95, 39 D.L.R. 691, is, to my mind, conclusive, that merely opening the door or having the door open is not an invitation to alight.

In *Gazey v. Toronto R.W. Co.*, 40 O.L.R. 449, 38 D.L.R. 637, it was decided by the First Divisional Court "that the opening of the door of a standing train or street-car, at a regular stopping place, is *primâ facie* an invitation to alight, but that opening it when the train or car is not at a stopping place and is moving so fast that the motion is perceptible to any reasonably careful passenger is not, without more, an invitation to alight; that opening it at a stopping place and slowing down the train or car is some evidence to go to the jury of an invitation to alight; that circumstances alter cases, and that each case of these kinds must depend upon its own circumstances."

I am of opinion that a car moving at the rate of 5 miles an hour was going so fast that the motion was perceptible to any reasonably careful passenger, and that the plaintiff is excluded from recovering by the principles of the judgment in the *Gazey* case.

It is also to be noted that the door was not opened at a stopping place, but before the stopping place was arrived at, which distinguishes this case from the *Gazey* case in a sense favourable to the defendants.

At the trial a question of evidence arose which is of great practical importance.

The plaintiff says that, after he had fallen, the conductor got off the car, helped him to his feet, and said: "It was my fault, I should not have opened the door, but I thought the car had stopped." The plaintiff urges that he should have been allowed to give that statement in evidence, and he moves for a new trial upon the ground of improper exclusion of evidence.

I think that the learned Judge was clearly right. There can be no pretence that what was said by the conductor was said by him in the course of his employment by the defendant company, and it is quite clear, both upon principle and authority, that statements made by an agent in this position are not evidence against the principal: *Wilson v. Botsford-Jenks Co.* (1902), 1 O.W.R. 101, and cases cited.

But it is urged that this statement should have been admitted on the *res gestæ* principle—I do not think so. This "is based on

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the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts." Wigmore on Evidence, vol. 3, sec. 1747.

Whether this is an exception to the doctrine that hearsay evidence is not admissible is largely a question of terminology. It admits a statement or exclamation by a person injured, immediately after the injury, declaring the circumstances of the injury, or by a person present at the collision or other exciting occasion asserting the circumstances as they appear to him. The principle is said to have first made its appearance in 1693, when Chief Justice Holt in the case of *Thompson v. Trevanion*, Skinner 402, in an action for assault and battery, allowed what a woman said immediately after the hurt was received, and before she had time to devise or contrive anything for her advantage, to be given in evidence.

The principle is well stated by Lacombe, J., in the Circuit Court of the United States, in *United States v. King* (1888), 34 Fed. Repr. 302, at p. 314, as follows:—

"There is a principle in the law of evidence which is known as '*res gestæ*;' that is, that the declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness which they might otherwise not have. That rule is very carefully guarded by the courts . . . But you are not to give any more weight to a declaration thus made, or any weight at all, unless you are satisfied that it was

made at a time when it was forced out as the utterance of a truth; forced out against his will, or without his will, by the particular event itself, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for him to say. With that qualification, I think the testimony can be left safely with you"—that is, the jury—"and that there has been no error in admitting it."

In some State Courts of the United States the doctrine has been carried very far, much further than is admitted in our Courts or in the Courts by whose judgments we are bound—for example, *Hermes v. Chicago and Northwestern R.W. Co.*, 80 Wis. 590—but I do not think it necessary to cite or discuss these cases.

Cases in our own Courts are not numerous. *Garner v. Township of Stamford*, 7 O.L.R. 50, and *Regina v. McMahon* (1889), 18 O.R. 502, may be referred to.

It is plain that the statements made by the conductor were not made under a stress of nervous excitement produced by the accident. They were not a spontaneous and sincere response to the actual sensations and perceptions produced by the external shock—they were not forced out of him against his will—they were mere attempts on his part intentionally made, purposefully made, in order to excuse himself, and they did not answer any of the tests which determine statements to be admissible under the *res gestæ* doctrine.

It is somewhat difficult to my mind to reconcile the admission of this kind of evidence with the ordinary rules governing the admission of evidence, and it is equally difficult to reconcile all the dicta or indeed the decisions on the subject; but the above, I think, represents the law as it is considered to exist at the present time.

Best on Evidence, 11th ed., pp. 466 and following, Phipson on Evidence, 5th ed., pp. 46 and following, have a discussion of these principles, but the most philosophical and satisfactory to my mind is to be found in Wigmore on Evidence, vol. 3, sec. 1747, *supra*. This learned author's statements must in all cases, however, be read with caution, as is the case with any American text-book, as he gives greater weight to the decisions of the Courts of the United

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States and of the various States of the Union than we are accustomed to do.

I am of opinion that the evidence was properly excluded, that the plaintiff has no cause of action, and that this appeal should be dismissed.

New trial ordered (RIDDELL, J., dissenting).

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[APPELLATE DIVISION.]

WEYBURN TOWNSITE CO. LIMITED v. HONSBURGER.

Company—Incorporation in Saskatchewan—Capacity to Carry on Business in Ontario—Contract for Sale of Land in Saskatchewan to Person in Ontario—Execution of Contract by Company in Saskatchewan—Carrying on Business in Ontario—Arrangements for Sale and Payments Made in Ontario—Action for Specific Performance Brought in Ontario Court—Comity—Defence—Misrepresentations.

The judgment of MASTEN, J., 43 O.L.R. 451, was reversed, the appellate Court holding that the defendant could not succeed upon the defence of *ultra vires*: in entering into the agreement sued on, the plaintiff company, incorporated in Saskatchewan, was not carrying on business beyond the limits of Saskatchewan; the company executed the agreement in Saskatchewan, and by it was bound to sell the land with which it dealt to the plaintiff on the terms which the agreement contained, and the fact that it was executed by the defendant in Ontario did not affect the question whether the plaintiff company was carrying on business in Ontario—nor did the facts that the oral arrangement for sale was made in Ontario, and a promissory note for part of the purchase-money was given to the company's agent there, and that payments thereon were received by the agent there, bear upon the question.

Bonanza Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566, distinguished. The Court agreed with the conclusion of MASTEN, J., that the company had, by its incorporation, no capacity to carry on business beyond the limits of Saskatchewan, and that the declaratory Act of the Saskatchewan Legislature of 1917 could not give validity to transactions entered into beyond those limits and before the passing of the Act; and also with his disposition of the defence based on misrepresentations.

Remarks by HODGINS, J.A., on the application of the doctrine of comity.

APPEAL by the plaintiff company and cross-appeal by the defendant from the judgment of MASTEN, J., 43 O.L.R. 451.

January 30. The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

W. N. Tilley, K.C., and J.W. Payne, for the plaintiff company, referring to *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566, 26 D.L.R. 273, argued that the learned trial Judge

had misconceived the effect of that decision, and that he erred in holding that the contract was invalid by reason of the plaintiff company not being at the time of the execution of the contract licensed to do business in Ontario. They referred to Lord Haldane's judgment, [1916] 1 A.C. at p. 578, and to the Saskatchewan Companies Act, R.S. of Saskatchewan 1909, ch. 72, sec. 17, and argued that the plaintiff company had the same capacity as a natural person to enter into the contract in question. Reference was also made to *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653, especially *per* Lord Cairns, L.C., at pp. 668, 669, treating of the general powers and capacity given by the statute which was there in question; *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1.

A. Courtney Kingstone, for the defendant, argued that the contract was really made in Ontario, when the agents of the plaintiff company entered into the oral agreement and accepted the defendant's promissory note. He referred to *Veltre v. London and Lancashire Fire Insurance Co.* (1917), 40 O.L.R. 619, 39 D.L.R. 221, affirmed in *London and Lancashire Fire Insurance Co. v. Veltre* (1918), 56 Can. S.C.R. 588, 42 D.L.R. 79; *Actiesselskabet Dampskib Hercules v. Grand Trunk Pacific R. W. Co.*, [1912] 1 K.B. 222; the *Bonanza Creek* case, [1916] 1 A.C. 566, *per* Lord Haldane at p. 584; *Boulevard Heights Limited v. Veilleux* (1915), 52 Can. S.C.R. 185, 26 D.L.R. 333.

Tilley, in reply, argued that the *Bonanza Creek* case had no application to the case at bar.

February 13. MEREDITH, C.J.O.:—This is an appeal by the plaintiff company from the judgment, dated the 2nd October, 1918, which was directed to be entered by Masten, J., after the trial before him, sitting without a jury in Toronto, on the previous 19th and 20th March; and the reasons for judgment are reported in 43 O.L.R. 451. The defendant cross-appeals against the findings as to the alleged misrepresentations.

I agree with the conclusion of the learned trial Judge that the appellant company, by its incorporation, acquired no capacity to carry on business beyond the limits of the Province of Saskatchewan, and that the declaratory legislation of 1917 could not

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give validity to transactions entered into beyond those limits and before the passing of the Act.

The reasoning upon which that conclusion was based was not answered upon the argument before us and is, in my opinion, unanswerable. I also agree with the disposition made of the defence based on misrepresentations, which was the subject of the cross-appeal.

I am unable, however, to agree with his conclusion as to the effect on the transaction in question of the decision of the Judicial Committee in the case of *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566, 26 D.L.R. 273.

As I understand, my learned brother's view is, that the agreement of the parties was made between certain agents of the appellant and the respondent, and that it was made in this Province; that, although the agreement was not enforceable by reason of the provision of the Statute of Frauds, the appellant ratified it and evidenced it by executing under its corporate seal the agreement sued on.

The agreement sued on was executed by the appellant in the Province of Saskatchewan, and, as I understand the evidence, was forwarded by mail to Gayman, who acted for the appellant at Jordan, and he procured the execution of it by the respondent at that place.

I am unable to see how the fact that the verbal arrangement was made at Jordan, or the fact that a promissory note for part of the purchase-money was given by the respondent to the appellant's agent there, or that the note was renewed through and payments on it were received by the appellant's agent there, bears upon the question which is to be determined—which, in my judgment, is, whether or not the agreement sued on is invalid because in entering into it the appellant was carrying on business beyond the limits of the Province of Saskatchewan.

I do not see how the execution of the agreement sued upon can be treated as a ratification of the verbal agreement that had been entered into at Jordan. Assuming, as my brother Masten held, that the appellant had not capacity to enter into that arrangement, how could there be any ratification of it? It was a void proceeding and incapable of ratification.

If I am right thus far, it follows that the question I have mentioned is the real and only question to be determined.

I cannot bring myself to believe that the decision in the *Bonanza Creek* case was intended to apply to such a transaction.

The appellant executed the agreement in Saskatchewan, and by it was bound to sell the land with which it deals to the respondent on the terms which the agreement contains, and I do not see how the fact that it was executed by the respondent in Ontario affects the question.

Surely it cannot be that, if the appellant had received by mail an offer sent from another Province, and by letter written and mailed in Saskatchewan had accepted the offer, and had afterwards prepared and executed there an agreement in terms of the offer and had mailed it to the purchaser for execution by him, and he had executed it in the other Province and had returned it by mail to the appellant, it must be held that the transaction was entered into beyond the limits of Saskatchewan, and was therefore a nullity. Or, if it had been that the respondent had made his verbal arrangement in Saskatchewan and it had been carried out as the transaction he did enter into was carried out, it cannot be, I think, that the mere fact that the written agreement had been sent to the respondent and it had been executed by him in Ontario would, by the application of the doctrine of the *Bonanza Creek* case, make the agreement void.

I would allow the appeal, reverse the judgment appealed from, and substitute for it judgment for the appellant for the relief claimed, with costs to the appellant here and below.

It must not be understood from what I have said that I am of opinion that the appellant company had not capacity to make in another Province a contract reasonably necessary or incidental to the proper or successful carrying out of its provincial object of selling lands in Saskatchewan. In my view, that question does not arise, and I express no opinion as to it.

MACLAREN, MAGEE, and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—I agree with the learned trial Judge in his view that the Province of Saskatchewan could not, when incorporation was obtained, endow the appellant with power to carry on business outside the boundaries of that Province. But that is a very different thing, as it seems to me, from deciding that where, in exercising powers validly conferred by a Province, a company

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makes a contract clearly within those corporate powers, it may not sue upon that contract outside the confines of the Province.

As I understand the cases dealing with comity, the restriction quoted by the learned trial Judge relates to fundamental subjective incapacity to do the act or exercise the power in question. Comity has nothing to work on where in the country of origin the power or authority is absent. It cannot acknowledge or respect that which does not exist. Here the power to sell lands was properly conferred, and the contracts made pursuant thereto might, except for the laws of Ontario, be sued on here under the doctrine of comity, unless the *Bonanza Creek* case prevents this doctrine being applicable.

I understand the decision in appeal to be rested on the finding that the appellant attempted to make a contract here, and by so doing was carrying on business in Ontario, which it had no power to do, nor had it capacity to acquire that right, and that therefore the doctrine of comity did not assist it.

While upon those facts I would agree in that view, I think that the right of access to our Courts for the purpose solely of recovering the purchase-money was open to the appellant, provided that the contract was validly entered into within the scope of the powers conferred on it in its incorporation. While the doctrine of comity is now, in Ontario, restricted by the provisions of the Ontario statute relating to the licensing of foreign corporations, yet, having obtained a license thereunder, the appellant is, to my mind, entitled to sue here, and should recover, unless the finding of the learned trial Judge is right that the contract was in fact made here.

On that issue I think the point made by the appellant that the agreement sued on was concluded and therefore made in Saskatchewan is well-founded.

It is true that there was a verbal bargain of sale and purchase entered into in Ontario, and, if the parties had rested content with that, the appellant would be out of Court. But they did not do so. They superseded it by the written agreement which, till signed in Saskatchewan, was of no effect, but, when executed there by the company and assented to by the other party, became in all respects, but only then, effectual and binding on both parties.

It may be that certain expressions in the *Bonanza Creek* case are wide enough and the reasoning subtle enough to prevent a

company incorporated as the appellant is, doing any business and suing in Ontario upon contracts made in Saskatchewan, even when such business and suit are only incidental to or consequent upon the proper exercise of its powers in its home Province. It does not directly say so, and I am very loath to sacrifice, in this simple action, the well-understood doctrine of comity unless forced to do so. I see no single advantage which has been gained by hampering commercial operations between the different Provinces and turning every action into a controversy about constitutional rights. In consequence I prefer to wait until it is authoritatively said that such an action is incompetent.

I therefore agree that the appeal should be allowed and judgment should be entered for the appellant.

I may add perhaps that I agree with the very able judgment of my brother Masten on the other points so conclusively dealt with by him.

Appeal allowed and cross-appeal dismissed.

[CLUTE, J.]

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Infant—Custody—Contest between Parents—Misconduct of Father—Welfare of Infant—Infants Act, sec. 2.

Upon a contest between the father and mother of a child, a girl of 11 years, as to her custody, it was *held*, that the mother was justified by the misconduct of her husband, the father, in leaving him, and that, having regard to the welfare of the child, the custody should be awarded to the mother: sec. 2 of the Infants Act, R.S.O. 1914, ch. 153.

In re A. and B. (Infants), [1897] 1 Ch. 786, followed.

Re Scarth (1916), 35 O.L.R. 312, distinguished.

UPON the application of Sylvester Wilkites, the father of the infant Vitalia Wilkites, for the delivery to him by his wife, Antonia Wilkites, the mother, of the person of the infant, an issue was directed to be tried "to decide as to whether the said Sylvester Wilkites should have the custody of his daughter Vitalia."

January 20 and 21. The issue was tried by CLUTE, J., without a jury, at a Toronto sittings.

George Wilkie, for Sylvester Wilkites.

McFadden, for Antonia Wilkites.

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February 14. CLUTE, J.:—The infant Vitalia Wilkites is 11 years old. The parents are Lithuanians. They were married in Glasgow and resided there for some years. The father came to Canada 7 years ago; the mother, and child, then 4 years of age, followed the father a short time after his arrival in Canada.

There have been differences between the husband and wife for some years. He is jealous of her and he charges his wife with immoral conduct with different men, and relates many circumstances which, if true, would tend to shew that the wife was guilty of immoral conduct.

I am unable to accept his evidence as trustworthy. Several other witnesses were called by him for the purpose of shewing improper conduct on the part of the wife. This evidence was also unsatisfactory. I could not and do not feel that the witnesses were telling the simple truth.

Quite apart from the evidence of the wife and of the witnesses called on her behalf, the evidence failed to satisfy me that the woman was leading an immoral life. On the contrary, from the whole evidence, I am satisfied that she is a hard-working, sober woman, trying to do the best she can for her child. I think the difficulties in the family have arisen largely from the husband's jealousy, watching every turn and move she made, and imputing everything to misconduct and disloyalty upon her part. I am also satisfied that the husband was guilty of gross misconduct towards her in language and in act. He beat her on several occasions without cause and put her in continual fear of him, and it was this and his imputation against her that caused her to leave his home, taking the child with her.

I think that under the circumstances she was justified in doing so. She and her child are boarding at a comfortable home and with reputable people. There is no suggestion that this is not so. The child is well clothed and well cared for, attends school, church and Sunday-school, and is very fairly advanced in her studies for her age. She is evidently a bright child, in perfect health.

The husband is living at a boarding-house and has made no special provision to take the child. She and her mother are living with a family consisting of husband and wife and one child, a little younger than herself. The child seems perfectly contented and happy and wishes to remain with her mother; and, in my opinion,

it is much better for the child that she should remain with the mother at her tender age than be placed under the care of her father.

Unless the law declares that the father is entitled to the custody of the child under the facts, in disregard of the child's interest, she should be allowed to remain where she is—under the charge of the mother.

This is a contest for the custody of the infant between the father and mother. It is urged on behalf of the father that he has the prior right, and that there is nothing in the facts and circumstances of this case to deprive him of that right. On behalf of the mother it is said that under the law as it exists in Ontario the first consideration has reference to the welfare of the infant, and that the right of the mother is at least equal to that of the father; and, where it is made to appear that it is in the interest of the infant to remain with the mother, having regard to all the circumstances of the case, in such case a Court will not interfere to deprive the mother of the custody of the infant in favour of the father.

Section 2 of the Infants Act (R.S.O. 1914, ch. 153) provides that the Supreme Court may, upon the application of the mother of an infant, make such order as the Court sees fit regarding the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father. This section corresponds to sec. 5 of the English Guardianship of Infants Act, 1886, 49 & 50 Vict. ch. 27.

In *In re A. and B. (Infants)*, [1897] 1 Ch. 786, the question of the effect of the statute in modifying the common law as to the rights of the father in relation to the custody of the infant children is considered: and it was there held that "the Court has, after taking into account the various considerations mentioned in sec. 5, full jurisdiction to override entirely the common law right of a father in relation to the custody of his infant children. In 'having regard to . . . the conduct of the parents and the wishes as well of the mother as of the father,' the Court will not treat the parents in an unequal manner or differently the one from the other, but will take the whole conduct and wishes of both parents into consideration. The Court will in a proper case give a mother the custody of her infant children, notwithstanding that the mother may have been guilty of matrimonial misconduct."

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Chitty, J., points out (p. 788) that at common law the rights of a father to the guardianship and custody of his children were absolute. Referring to sec. 5, he points out (p. 789) that a wide discretion is conferred on the Court as to the custody of and access to infants; but the judicial discretion must be exercised having regard to the matters mentioned in the section. These are—(1) the welfare of the infant, (2) the conduct of the parents, and (3) the wishes as well of the mother as of the father. Chitty, J., held under the facts in that case that the father and mother should have the custody of the child each for 6 months in the year. In appeal this judgment was affirmed. Lindley, L.J., said (p. 790):—

“Nobody can read the various sections in the Act without seeing that it is essentially a mother’s Act. It has very greatly extended the rights of mothers. I do not say that it has much, if at all, diminished the rights of fathers except as regards mothers; but to say that sec. 5 is to have no operation unless the father has so conducted himself towards his children as to justify the Court in depriving him of his children, is to reduce the section to a nullity; the section might as well be out altogether. What was the section put in for? What did the Legislature want to accomplish? The section was considered necessary and was inserted because Talfourd’s Act and the Act of 1873 as construed by the Courts had not gone far enough in favour of the mother. It was to increase her rights, regard being had of course to the interests of the children. Section 5 has nothing to do with the rights of the father except as between him and his children and their mother. . . . The section has very materially altered the law relating to the custody of infants, and I am not in the least disposed to say anything that will narrow the ordinary construction of its words.”

The judgments of Lopes, L.J., and Rigby, L.J., are to the same effect.

Mr. Wilkie relied strongly on *Re Scarth* (1916), 35 O.L.R. 312, 26 D.L.R. 428. In that case the father was a person of considerable means, the manager of a bank, and in receipt of a salary of \$3,000 a year. The wife had no income except what she might receive from her father. Lennox, J., awarded the custody of the child of 10 to her father, the mother having chosen without valid reasons to live apart from him. This decision was affirmed by the appellate Court. *Re Mathieu* (1898), 29 O.R. 546, was

approved. Maclaren, J.A., dissenting, came to the conclusion that it was not in the interests of the child that she should be removed from the care of her mother.

In re Story, [1916] 2 I.R. (K.B.D.) 328, 336, may also be referred to.

In *Re Mathieu* (1898), 29 O.R. 546, it was held that where the husband has done no wrong and is able and willing to support his wife and child, the Court will not take away from him the custody of his infant child merely because the wife prefers to live away from him, and because it thinks that living with the father apart from the mother will be less beneficial to the infant than living with the mother apart from the father. Street, J. (p. 550), refers to *In re Agar-Ellis* (1878), 10 Ch. D. 49, 71, and quotes from that case: "The right of the father to the custody and control of his child is one of the most sacred of rights," etc.

Now the *Agar-Ellis* case was a decision under the English Custody of Infants Act, 1873, 36 & 37 Vict. ch. 12, sec. 1; and in *In re A. and B. (Infants)* the effect of the subsequent Guardianship of Infants Act, 1886, 49 & 50 Vict. ch. 27, secs. 2, 3, and 5, is pointed out.

Many cases are cited in *Re Taggart* (1917), 41 O.L.R. 85, 39 D.L.R. 559, but that was a contest between the mother and aunt, in which the Court of Appeal was equally divided and the decision of the trial Judge affirmed. The majority of the Supreme Court confirmed the view in favour of the aunt with whom the child had resided.

The effect of the decision of the statute upon the common law is, I think, well stated in the *A. and B.* case, which, so far as it is applicable to this case, I follow; but, in doing so, I do not wish to be understood as taking the view that the *Scarth* case is not good law: the facts vary from the present case. The ill-treatment by the husband caused the wife to leave him: she has fully discharged her duties as a mother toward the child. I think it would be an injury to the child to remove her from the custody of the mother and her present surroundings to that of the father.

I decide the issue in favour of the mother and against the father's claim to the custody of the child.

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Feb. 20.

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ATTORNEY-GENERAL FOR ONTARIO V. ELECTRICAL DEVELOPMENT
Co. LIMITED.

Contract—Queen Victoria Niagara Falls Park Commissioners—62 Vict. (2) ch. 11, sec. 36 (O.)—Grant of License to Take Water from Niagara River within Park—Development of Electrical Power “for Commercial Use”—Construction of Contract—Assignment by Grantees to Electrical Company—Lease of Undertaking to another Company—Assignment of License—“Amalgamation”—Expert Evidence to Aid in Interpretation—Inadmissibility—Rental Payable to Commissioners—Ascertainment of—Energy Consumed in Act of Production—Limitation of Quantity of Water to be Taken—Rate of Payment for Water Taken over and above Amount Limited—Damages—Injunction against Future Breach of Contract by Excessive Taking—War Measures Act, 1914—Order of Power Controller for Increased Production—Efficiency of Plant and Machinery—Advance in Standard.

Pursuant to the power granted by the Ontario Act 62 Vict. (2) ch. 11, sec. 36, the Commissioners for the Queen Victoria Niagara Falls Park, by an agreement of the 29th January, 1903, granted to certain persons called “The Syndicate,” for the purpose of generating electricity and pneumatic or any other power to be transmitted, and capable of being transmitted, to places beyond the Park, “a license irrevocable to take from the waters of the Niagara River within the Park a sufficient quantity of water to develop 125,000 electrical or pneumatic or other horse-power for commercial use.” By clause 14 of the agreement, the license was granted for 50 years, with certain rights of renewal, the Syndicate paying therefor a yearly rental of \$15,000 and a further sum “for each electrical horse power generated and used and sold or disposed of over 10,000 electrical horse power.” By clause 25, the Syndicate should not amalgamate with any other company nor enter into any arrangement which might have that effect. By clause (c), “The Syndicate” was to be understood to mean not only the named individuals, but also their and each of their heirs, executors, administrators, and assigns. By clause 27, the Syndicate agreed that, within two years from the date of the agreement, they would sell, assign, convey, and transfer to a company having power to construct and operate the works proposed, all the rights and franchises conferred upon the Syndicate. On the 25th March, 1903, the Syndicate assigned its rights under the agreement to the E. D. company, and the agreement and assignment were confirmed by 5 Edw. VII. ch. 12 (O.) On the 16th April, 1908, an agreement was entered into between the E. D. company and a transmission company and the T. P. company, by which the undertakings of the E. D. company and of the transmission company were leased to the T. P. company from the date of the agreement until the 1st March, 1913, this term exceeding by one month the duration of the license granted and its renewal terms. In consideration of this, the T. P. company agreed to assume and pay the rental due to the Commissioners, and to make all accruing payments upon debentures issued by the E. D. company, and, if the earnings permitted, a sum which would enable that company to pay dividends upon its preferred shares. In an action by the Attorney-General and the Commissioners against the E. D. and T. P. companies:—

Held, that the arrangement last referred to was not an amalgamation of the two companies nor had it the effect of an amalgamation.

In re South African Supply and Cold Storage Co., [1904] 2 Ch. 268, and *City of Toronto v. Toronto Electric Light Co.* (1905), 10 O.L.R. 621, referred to.

(2) Expert testimony tendered as evidence to aid in the interpretation of the contract—the main object being to attribute some particular significance to the words “for commercial use”—was rejected.

(3) Evidence, properly admissible, established that in the generation of electrical energy some portion of the energy was consumed in the act of production, and never became available for sale—this included “excitation loss” and “transformer loss.” The effect of introducing the words “for commercial use” was to entitle the licensee to generate not merely 125,000 horse power, but 125,000 horse power “for commercial use”—the measurement of the power is to be made at a point where the electrical energy can be delivered for commercial use, thus excluding from computation all electricity used by the company itself and in the production of the energy available for sale, including excitation and transformer losses.

Attorney-General for Ontario v. Canadian Niagara Power Co. (1912), 2 D.L.R. 425, 3 O.W.N. 545, distinguished, the contract there in question not containing the words “for commercial use.”

(4) By the license to take from the river “a sufficient quantity of water to develop 125,000 electrical, pneumatic, or other horse power for commercial use,” a limit was placed beyond which the licensee was not authorised to go: the words “for commercial use” should not be construed as authorising the exceeding of the limit of 125,000 horse power, provided that the average did not exceed that amount.

(5) The additional rental, under clause 14, should be calculated by reference to the highest quantity generated and disposed of—that is, when the quantity generated and disposed of reached any given number of electrical horse power the rental should be calculated by reference to it.

Attorney-General for Ontario v. Canadian Niagara Power Co., [1912] A.C. 852, followed.

(6) For water taken for the purpose of generating electricity over and above the amount limited by the contract, payment should be made at the rate of 50 cents for each horse power generated, used, and disposed of—not upon a cumulative peak basis, but at the rate indicated for the highest point of excess during each half year.

(7) The defendants, having exceeded the amount of water which they were authorised to take under the agreement, should be enjoined from any further breach of contract: the injunction to be subject to the terms of any order for increased production made by the Power Controller under the Dominion War Measures Act, 1914.

(8) The limit beyond which the defendants must not go in taking water from the river was to be determined by the amount necessary for the production of 125,000 electrical horse power by the machinery installed, maintained in a state of reasonable efficiency—the agreement does not contemplate any change in the system as the standard of efficiency advances.

AN action by the Attorney-General for the Province of Ontario and the Commissioners for the Queen Victoria Niagara Falls Park against the Electrical Development Company Limited and the Toronto Power Company Limited, to recover arrears of rental under an agreement, for damages and an injunction, and for a declaration of the effect of a certain agreement between the two defendants.

The defendant the Electrical Development Company Limited counterclaimed for certain declarations as to its rights.

October 30 and 31 and November 1, 1918. The action and counterclaim were tried by MIDDLETON, J., without a jury, at a Toronto sittings.

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G. H. Kilmer, K.C., and Christopher C. Robinson, for the plaintiffs.

H. J. Scott, K.C., D. L. McCarthy, K.C., and A. W. Anglin, K.C., for the defendants.

February 20, 1919. MIDDLETON, J.:—This action arises upon an agreement bearing date the 29th January, 1903, between the Commissioners for the Queen Victoria Niagara Falls Park and William Mackenzie *et al.*, designated in the agreement as "The Syndicate."

By an Act of the Province, 62 Vict. (2) ch. 11, sec. 36, the Commissioners, with the approval of the Government, are empowered to enter into an agreement with any person or company to take water from the Niagara River, within the limits of the Park, for the purpose of enabling such person or company to generate electricity or pneumatic, hydraulic or other power in such manner, for such rental, and upon such terms and conditions as may be embodied in the agreement.

Pursuant to this power, by the agreement in question, the Commissioners granted to the Syndicate, "for the purpose of generating electricity and pneumatic or any other power to be transmitted, and capable of being transmitted, to places beyond the Park," "a license irrevocable to take from the waters of the Niagara River within the Park a sufficient quantity of water to develop 125,000 electrical or pneumatic or other horse power for commercial use."

By clause 14 of the agreement, a clause which requires to be fully considered, the license was granted for a term of 50 years from the 1st February, 1903, with certain rights of renewal, the Syndicate paying therefor a clear yearly rental of \$15,000, and, in addition, a further sum to be paid "for each electrical horse power generated and used and sold or disposed of over 10,000 electrical horse power."

By clause 25 it is provided that the Syndicate shall not amalgamate with any other company nor shall it enter into any arrangement or agreement which may, directly or indirectly, have that effect.

By the interpretation clause (c) the expression "The Syndicate" is to be understood to mean not only the named individuals, but

also their and each of their heirs, executors, administrators, and assigns; and, by clause 27, the Syndicate agree that, within two years from the date of the agreement, they will sell, assign, convey, and transfer to a company formed or to be formed, having power to construct and operate the works in question, all the rights and franchises conferred upon the Syndicate.

The agreement describes the works to be constructed by the Syndicate as consisting of a gathering dam to be erected in the bed of the river, a power house to be constructed in the bed of the river, to be excavated to a depth which will allow the waters of the river to be conducted through the penstock and the turbines to be erected, and thence by a tailrace, and to be discharged under the main falls of the river. A transformer house was also to be erected at some distance from the bank of the river. These works are described to be "for the generation of 125,000 electrical horse power," and "to permit the Syndicate to take sufficient water at the lowest stages of the river for the generation of 125,000 electrical horse power in the power house of the company."

The Syndicate assigned their rights under the agreement to the Electrical Development Company on the 25th March, 1903, and the agreement and assignment were confirmed by an Act of the Province, 5 Edw. VII. ch. 12.

The plaintiffs claim in this action: first, arrears of rental which are due upon their construction of clause 14 of the agreement; second, damages by reason of the taking of more water than is authorised by the grant, according to the plaintiffs' interpretation of the agreement; third, an injunction restraining the defendants from taking water in excess of the grant; fourth, a declaration that the agreement between the Electrical Development Company and the Toronto Power Company is within the prohibition of clause 25 of the agreement; and consequential relief.

The defendant the Electrical Development Company counter-claims asking a declaration of its rights as to the use of the water under the grant and also a declaration that the power plant as constructed is such as it was entitled to construct and use under the agreement. In the defence to the counterclaim the plaintiffs state that the plant, by reason of inefficient construction and design, takes from the river a greater quantity of water than

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is sufficient to develop the quantity of electrical power fixed by the agreement, but no claim is based upon the allegation.

It is convenient to deal first with the effect of the transaction between the defendants alleged to constitute "an amalgamation" or "to have the effect of" an amalgamation, contrary to the provisions of clause 25.

On the 16th April, 1908, an agreement was entered into between the Electrical Development Company and the Toronto and Niagara Power Company, a transmission company, and its co-defendant the Toronto Power Company Limited, by which the undertakings of the Electrical Development Company and of the transmission company are let, demised, and leased to the Toronto Power Company from the date of the agreement until the 1st March, 2013, this term exceeding by one month the duration of the license granted, including its renewal terms. In consideration of this, the Toronto Power Company agrees to assume and pay the rental due the Commissioners, and to pay all accruing payments due upon debentures issued by the lessors, and, if the earnings permit, a sum which will enable the Electrical Development Company to pay dividends upon its preferential stock.

This, in my view, is not an amalgamation of the defendant companies nor has it the effect of an amalgamation. It is at most an assignment of the license, a thing that is not prohibited, but is contemplated, by the agreement. Adapting the words of Mr. Justice Buckley in *In re South African Supply and Cold Storage Co.*, [1904] 2 Ch. 268, the word "amalgamation" has not any definite legal meaning. It is a commercial, and not a legal, term, and, even as a commercial term, it bears no exact definite meaning. In each case one has to decide whether the transaction is such that, in the meaning of commercial men, it is one which is comprehended by the term "amalgamation." To constitute an amalgamation there must be a blending substantially of two or more existing concerns. Here there was, at most, a leasing of the undertaking or an assignment of the license, and nothing that in either form or substance amounts to amalgamation: *City of Toronto v. Toronto Electric Light Co.* (1905), 10 O.L.R. 621.

Turning to the other and more difficult questions raised. In the first place, expert evidence was tendered with a view of aiding me in rightly interpreting the contract. I do not think that that

evidence is properly admissible. In my view, the construction of the contract depends upon its own terms, and must be arrived at without the aid of any oral testimony, expert or otherwise. This expert evidence was mainly directed to the attributing of some particular significance to the words "for commercial use" occurring in the grant.

I allowed the evidence to be given, subject to objection, lest any appellate tribunal should think it properly admissible.

Evidence which is, in my view, properly admissible establishes that in the generation of electrical energy some portion of the energy is consumed in the act of production, and never becomes available for sale—this includes "excitation loss" and "transformer loss." In the case of *Attorney-General for Ontario v. Canadian Niagara Power Co.* (1912), 2 D.L.R. 425, 3 O.W.N. 545, it was determined by the Court of Appeal that under the contract there considered payment must be made for the entire horse power actually generated without any allowance for such losses. That contract did not contain the words here used, "for commercial use." The effect of the introduction of these words is to entitle the licensee to generate not merely 125,000 horse power, but 125,000 horse power "for commercial use;" that is to say, that the measurement of the power is to be made at a point where the electrical energy can be delivered for commercial use. This excludes from computation all electricity used by the company itself and in the production of the energy available for sale, including excitation and transformer losses.

A far more important question is the meaning to be attached to the limitation of the license by which the defendants may "take from the waters of the Niagara River a sufficient quantity of water to develop 125,000 electrical, pneumatic, or other horse power for commercial use."

The plaintiffs contend that this indicates a limit beyond which the defendants are not authorised to go. According to the plaintiffs' view, it is the extreme amount of water which may be taken at any one time. The defendants, on the other hand, contend that the expression "for commercial use" indicates that the limit is not one to be strictly adhered to, that they may take 125,000 horse power on the average or at least with what they call "a swing" of 20 per cent.; that is to say, they are not to be

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deemed to exceed the privilege granted if they do not take at any one time more than 20 per cent. in excess of 125,000 horse power, provided that at some other time they take 20 per cent. less than 125,000 horse power, so that the average does not exceed this amount. The mere statement of this proposition, as being something that was intended by the agreement, appears to me to demonstrate the fallacy of the argument. If this had been the intention of the parties, it certainly could have been expressed in more felicitous language.

The water flowing over the falls in the Niagara River is not unlimited in quantity. The amount that may be used for the production of electricity is limited by agreement between Canada and the United States. When the right to use a portion of the water available for use on the Canadian side was being granted by the Province, the determination of the utmost that might be taken by the licensee was manifestly a matter of great importance. The licensee might not at all times use the full amount that he was entitled to take, but the fixing of an amount beyond which he should not at any time go was essential for the purpose of determining the amount of power that might be developed by subsequent grantees. If the grantee of the right to take 125,000 could close down his works for 12 hours, and operate them for another 12 hours, taking 250,000 horse power, or could operate them for 6 hours, taking 500,000 horse power, it is easy to see that complications and confusion might arise: to meet this obvious difficulty the defendants seek to introduce, based on opinions of experts, a limitation not found in the contract, and suggest that there should be read into the grant the words, "upon the average, provided the swing does not exceed 20 per cent." This is said to be the effect of the words "for commercial use."

The true meaning of the words "for commercial use" is, as I have already said, to be found in excluding from the computation all energy used by the company itself in the manufacture of saleable electricity.

Turning now to clause 14. This clause resembles closely the clause considered and dealt with by the Privy Council in the case already referred to, *Attorney-General for Ontario v. Canadian Niagara Power Co.*, [1912] A.C. 852, 9 D.L.R. 191. The only difference, singularly enough, is in the one sentence upon which

stress is laid in the judgment. The additional rental in the case there considered was to be paid "for and from" the development of the higher power. This covenant, while otherwise precisely the same, omits the words "and from," and it is argued that this enables the two covenants to be distinguished.

The plaintiffs contend, as was contended in the case referred to, that the true meaning of the clause is that the rental is to be calculated by reference to the highest quantity generated and disposed of—that is, that when the quantity generated and disposed of by the company reaches any given number of electrical horse power the rental to be paid to the Commissioners is to be calculated by reference to it. The contention of the defendants, on the other hand, is, that the quantity of the rental is not to be determined on the peak attained, but by the amount actually used, which can be easily determined by an integrating watt hour meter, recording the consumption, or by averaging the peaks. In dealing with the case before the Privy Council, their Lordships say (p. 863):—

"The case is not susceptible of much argument. It rather lends itself to minute criticism which would be out of place in this judgment. On the whole, not without some doubt and hesitation, their Lordships have come to the conclusion that the view of the appellants is to be preferred mainly on the ground that there are some expressions which it seems impossible to reconcile with the contention of the respondents, as, for instance, the direction that increased rental is to be payable not simply '*for*'—a word which has already been criticised—but '*from*' the development of the higher power."

I am not able to say that the words "and from" are the controlling factor in the judgment of their Lordships. There are other expressions which it is equally impossible to reconcile with the contention of the respondents, and it is to be noted that the expression referred to does not occur in the portion of the clause which provides for the payment of the additional rental, but in that portion of the clause which fixes the date for payment, and it is, therefore, of less moment than the exact words of the rental clause itself.

For these reasons, I think I ought to construe this clause as having the same meaning as attributed to the clause in question

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in the case referred to. This view is, I think, in accord with the opinion of the Supreme Court of Canada in *City of Montreal v. Montreal Light Heat and Power Co.* (1909), 42 Can. S.C.R. 431.

On the question as to what payment should be made for water taken for the purpose of generating electricity over and above the amount limited by the contract, there is room for wide difference of opinion. I have come to the conclusion that this should be paid for at a rate not wholly different from that stipulated for by the contract for electricity generated, between 30,000 electrical horse power and the maximum, i.e., 50 cents for each horse power generated, used, and disposed of. I do not think that this should be upon a cumulative peak basis, but that the payment should be made at the rate indicated for the highest point of excess during each half year.

No case has been cited which at all indicates the principle upon which damages should be assessed in a case of this kind. What I have suggested is, I think, fair, because the plaintiffs have not shewn any special damage resulting from the use made of that water, which would otherwise have gone idly by the property. On the other hand, the defendants cannot complain if they are called upon to pay, for that which they have taken without authority, a price somewhat in excess of what they have, under the contract, to pay for that which they have authority to take. I have fixed the price of 50 cents semi-annually, and not annually, to offset in some degree the fact that it is not payable beyond the half year.

The defendants have, in my view, exceeded the amount of water which they are authorised to take under the agreement, and there should, I think, be an injunction to restrain them from any further breach of contract. It is said that under the War Measures Act an order has been made by the Power Controller compelling the production, by the defendants, to the limit of their capacity, irrespective of their contract rights. The injunction I grant will be subject to the terms of any order made under the authority of that Act.

The defendants ask that I should make a declaration that the plant and machinery which they have established is such as they are entitled to maintain under the terms of the contract. I have no doubt upon the evidence that the plant was erected in accord-

ance with the provisions of the agreement and was in accordance with the best obtainable expert opinion at the time it was erected.

Evidence was given going to shew that the plant was not efficient, having regard to the advance made in this branch of engineering during the last few years. The evidence pro and con on this subject is exceedingly unsatisfactory and quite insufficient for a satisfactory determination of this issue. I do not think that this issue is one upon which I am called to pronounce any opinion, and I make no declaration upon the subject either one way or the other, leaving the matter entirely open to be raised in further litigation, but the limit which I fix beyond which the defendants may not go in taking water from the river is to be determined by the amount necessary for the production of 125,000 electrical horse power by the machinery installed, maintained in a state of reasonable efficiency. The agreement does not contemplate any change in the system as the standard of efficiency advances.

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*Judgment for the plaintiffs accordingly with the
general costs of the action; the defendants
to have the costs of the issue as to amalgama-
tion; no costs of the counterclaim.*

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BONISTEEL v. COLLIS LEATHER CO. LIMITED.

Company—Directors—Proposed Allotment of Unissued Shares of Authorised Capital by Directors to themselves—Means of Gaining Control of Affairs of Company—Rights of other Shareholders—Resolution of Directors—Declaration of Invalidity.—Injunction.

The defendant company was incorporated in 1912 under the Ontario Companies Act, with an authorised capital stock of \$150,000, divided into 1,500 shares of the par value of \$100 each, but only 1,208 shares had been issued. The plaintiff, a director, was the registered holder of 458 of these, and had agreed to buy 150 shares from another shareholder; which would give him a majority of the issued shares. At a meeting of the directors held in October, 1918, a resolution was passed (the plaintiff voting against it) that "the balance of the share capital of the company unissued be offered to the shareholders at par. This offer to remain open for 20 days." There were five directors, and all were present at the meeting. The president then asked each one present how many shares he would take. Two asked for 10 each, one for 100, and one for 50—these numbers bearing no fixed relation to their previous holdings. The plaintiff said he would take his proportion based upon his holding of 608 shares. This was not conceded; the

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plaintiff was offered 98 shares, which he refused. The directors then passed a resolution (the plaintiff voting against it) that the applications for the shares be accepted and that certificates be issued accordingly. The plaintiff, suing on behalf of himself and all shareholders other than the individual defendants, brought this action against the company, his four co-directors, and another shareholder who was to get some of the shares, to restrain them from making the allotment:—

Held, that the purpose of the defendant directors in all they did was to deprive the plaintiff of the controlling position which he had acquired—they were making a one-sided allotment of shares with a view to the control of the voting power.

Although the shares were not actually shares of new stock, they were practically in that position. No shares had been issued for a long time; the company had been carrying on a successful business with the capital it had; the readily saleable assets were apparently worth three or four times the par value of the issued shares, and each shareholder was justified in considering that he had an interest in these assets proportionate to his holding of the issued shares. To do something which would alter those proportions, to do it without giving to each shareholder an opportunity of protecting his interest, and to do it, not in the usual course of the company's business, but for the purpose of shifting from one body of shareholders to another the power of electing directors and so of controlling the company's policy, was beyond the powers of the directors.

Martin v. Gibson (1907), 15 O.L.R. 623, applied and followed.

Harris v. Sumner (1909), 39 N.B.R. 204, considered.

The second resolution passed at the meeting of the directors in October, 1918, was adjudged void, and the defendants were enjoined from acting thereon.

ACTION by a shareholder in the defendant company for an injunction restraining the issue and allotment of certain shares to the individual defendants.

The action was tried by ROSE, J., without a jury, at a Toronto sittings.

J. W. Bain, K.C., and *M. L. Gordon*, for the plaintiff.

J. M. Ferguson, for the defendants other than Bain.

H. C. Moore, for the defendant Bain.

February 28. ROSE, J.:—The plaintiff, who is the holder of a large number of the shares of the capital stock of the defendant company, and is also a director and the secretary-treasurer of the company, sues, on behalf of himself and all shareholders other than the individual defendants, for an injunction restraining the allotment and issue of certain shares to the individual defendants. Of the five individual defendants, four are the plaintiff's co-directors; the fifth is a shareholder to whom the four defendant directors propose to issue some of the shares in question.

The company was incorporated in 1912 under the Ontario Companies Act, with an authorised capital stock of \$150,000, divided into 1,500 shares of the par value of \$100 each. Prior to

the 26th October, 1918, 1,208 of the 1,500 shares had been issued. The plaintiff was the registered holder of 458 of these, and he had agreed to buy from another shareholder, J. M. Oxley, his holding of 150 shares. Of the 458 shares standing in his name, 219 had been acquired by allotment by the company, and the others had been bought at various times, principally in September and October, 1918. The later purchases had been at prices higher than par. Besides the plaintiff and Oxley, whose shares the plaintiff had agreed to buy, there were nine shareholders, viz., the five individual defendants, the estate of a deceased brother of the defendant Collis, which estate the defendant Collis represents, W. F. Kennedy (10 shares), H. T. Kinely (1 share), and N. C. Jones (5 shares). The position, as regards control of the company, thus was that if and so soon as the plaintiff paid Oxley and obtained transfers from him he would have 608 shares, as against the 600 held by the other nine shareholders.

The defendant Collis is the general manager of the company. He is a tanner, of, apparently, great ability, and, in the opinion of the defendant directors, is entitled to a great deal of credit for the success which the company has had. When he heard of the plaintiff's latest acquisition of shares and saw that the control of the company was getting into the plaintiff's hands, he consulted the president of the company as to whether the directors could legally issue the remainder of the authorised shares, 292; and he asked three of the other shareholders whether they would be willing to take up some of these shares. Two of them, one being a defendant director and the other being the defendant Bain, who is not a director, expressed their willingness to do so; the third, Kinely, who is a salesman in the employ of the company, said that he would not, or could not, subscribe. Collis also made it known that if the plaintiff was in control he would not be disposed to continue to serve the company as tanner.

A meeting of the directors was called for the 26th October, 1918. This was for the transaction of general business; but every one knew that the question of the issue of the 292 shares would come up, and the plaintiff came prepared with a protest, which had been written or revised by his solicitor, in which, after alleging that the company did not require additional capital and that the stock was worth much more than par, he insisted that if the directors determined to make the issue every shareholder should be

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notified of the value of the shares and given an opportunity to purchase, and expressed his own willingness to take up his proportion of the shares.

A resolution was passed by the defendant directors, the plaintiff voting against it, that "the balance of the share capital of the company unissued be offered to the shareholders at par. This offer to remain open for 20 days."

Then the president asked each of those present how many shares he would take, and each made his statement. The numbers asked for by the applicants bore no fixed relation to the previous holdings: a holder of 5 shares subscribed for 10, as did also a holder of 15; Collis, who held 209, subscribed for 100, while the president, who held 55, subscribed for 50. When it came to the plaintiff's turn he said he would take his proportion based upon his holding of 608 shares. The president told him that he was registered in respect of 458 only and was not entitled to be treated as if he was the holder of the shares which he had agreed to buy from Oxley; that offers had been received for all but 98 of the shares available for allotment; and he said, "Do you want the 98?"

The plaintiff repeated that he wanted his proportion. I do not remember that any witness said that it was stated at the meeting what the plaintiff's proportion of an issue of 292 shares would be upon the basis of a proportional allotment amongst all the shareholders, the plaintiff being treated as the holder of 458 shares; but, as I work it out, he would be entitled on that basis to 102 shares. The president did, however, say in the witness-box that he would have been willing to reduce his subscription, so as to give the plaintiff his full proportion on the basis last mentioned.

The directors then proceeded to pass a resolution that the applications of the individual defendants be accepted and that certificates be issued accordingly. The plaintiff voted against the resolution. What he seeks in this action is to restrain the defendants from making the allotment.

It will be observed that the first resolution was that the shares be offered to the shareholders, and that the offer remain open for twenty days. The reason given by the president for advising or joining with his co-directors in making an immediate allotment without sending formal notice to each shareholder announcing the proposed issue and giving an opportunity to subscribe is that he

thought he knew the wishes of each of them, and that, in his opinion, it was unnecessary to follow the procedure contemplated by the first resolution.

As has been mentioned, there were five shareholders besides the plaintiff and the individual defendants. One of these is Mr. Kennedy, a salesman in the employ of the company, living in Montreal. He was called as a witness at the trial and said he approved of the course followed. When he learned about what was being done did not clearly appear. The second was the Collis estate. The defendant Collis is, as I recollect, the executor of his brother's will. The third is Mr. Oxley, already mentioned. He was over-seas, and the president thought that, as he had agreed to sell his holdings to the plaintiff at par, he would not wish to take up more stock at the same price. The fourth, Dr. Jones, was also over-seas, and the fifth, Kinely, had told the defendant Collis that he would not subscribe. I have no doubt that the president did argue the matter out in his own mind in the way stated; but that it was not safe to assume that the absent shareholders would approve of what was done is shewn by the fact that at a meeting of shareholders held on the 14th December, 1918, Dr. Jones, through his proxy, joined forces with the plaintiff, and, the plaintiff voting in virtue of his registered holdings and also as proxy for Oxley, there was carried, by a vote of 613 against 595, a resolution expressing disapproval of, and a refusal to ratify and confirm, the action of the directors in attempting to issue the shares.

Upon the evidence there is no doubt at all that the purpose of the defendant directors in all that they did was to deprive the plaintiff of the controlling position which he had acquired. No doubt they thought that it was not in the best interest of the company that he should control its affairs, and, in that sense, they acted in good faith and in what they believed to be the best interest of the company; but, nevertheless, I think that what they attempted to do was exactly what *Martin v. Gibson* (1907), 15 O.L.R. 623, shews that directors have no right to do: they were making a one-sided allotment of stock with a view to the control of the voting power; they were ignoring, to use the words of the Chancellor (p. 633), "the general principle and guide, in dealing with the distribution of new stock and the claims of existing share-

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holders, that 'equality is equity'." True, the shares in question were not shares of *new* stock, properly so called, and no one would think of saying that directors may never allot shares of an authorised issue without first offering to the existing shareholders the shares which they propose to allot; but the allotment here proposed differs radically from the usual allotment from time to time, as opportunity offers, of the shares of an issue which has been determined upon as the means of providing a company with the requisite working capital; it seems to me to be, in all its essentials, practically the same thing as the new issue which was in question in *Martin v. Gibson*. No shares had been issued for a long time; the company had been carrying on a successful business with the capital which it had; the readily saleable assets were apparently worth three or four times the par value of the issued shares; each shareholder was justified in considering that he had an interest in those assets proportionate to his holding of the issued shares; to do something which would alter those proportions, to do it without giving to each shareholder an opportunity of protecting his interest, and to do it, not in the usual course of the company's business, but for the purpose of shifting from one body of shareholders to another the power of electing directors and so of controlling the company's policy, was, I think, beyond the powers of the directors.

Mr. Ferguson relied strongly upon the case of *Harris v. Sumner* (1909), 39 N.B.R. 204. That case differs from *Martin v. Gibson* and resembles the case at bar in one particular, viz., that the shares in question were shares of the capital stock originally authorised and not shares of a new issue, and the Court, or at least McLeod, J., with whom Landry, J., concurred, seems to attach some importance to the distinction. I have already stated my reasons for thinking that the shares in question here are for all practical purposes the same as the new shares which were in question in *Martin v. Gibson*. *Harris v. Sumner*, however, differs from both *Martin v. Gibson* and from this case in that the subscriber to whom the directors made the allotment, "personally and without consulting with any of the directors, subscribed for the" shares (p. 216), and, "apart . . . from all other considerations, the directors might very well, in the exercise of sound business judgment, have concluded it would be best, in the interests of the company, to sell, as they did, to" him (p. 229). The matter did not originate, as in the case at bar,

in an effort on the part of a majority of the board of directors to alter the right to control the company's affairs; and White, J., says (p. 228): "I wish to guard myself—with perhaps unnecessary precaution—against being understood as entertaining the view that directors may properly allot unsold shares to one stockholder and refuse to allot them to another, merely because they believe the former will use the votes thus acquired to support some course of action or line of policy which the directors deem to be in the best interests of the company, while, on the other hand, they believe the latter would support a different policy and one detrimental to such best interests." *Martin v. Gibson* seems to me to be much more directly in point than *Harris v. Sumner*; but, even if they are both in point, and if *Harris v. Sumner* does lay down something at variance with what was decided in *Martin v. Gibson*, the latter case is binding upon me. See also *Swayze v. Grobb* (1915), 8 O.W.N. 316.

There will be judgment declaring that the resolution passed by the directors on the 26th October, 1918, accepting the applications of the individual defendants for shares of the capital stock of the company and directing that share certificates be issued, is void, and for an injunction restraining the defendants from acting thereon. The individual defendants will pay the plaintiff's costs.

After the foregoing had been written, Mr. Ferguson applied to me to re-open the case for the purpose of hearing the evidence of Mr. Oxley, who, as the defendants learned after the trial, had returned to Toronto some time ago. The case was accordingly re-opened, and the evidence given. Mr. Oxley says that he first heard of the matter a day or two ago, that he has no intention or desire of taking up any further shares, that the shares which are still registered in his name he looks upon merely as collateral security for the plaintiff's promise to pay for them, and that he considers the action of the directors to be no affair of his.

This evidence does not appear to me to be of importance. The question is not whether Mr. Oxley now wishes to take any active part in opposing the action of the board, but whether on the 26th October, 1918, the directors were justified in making the allotments in question. Even if Mr. Oxley had said, on that day, that he did not wish to subscribe, it would not have followed that the

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majority of the board could lawfully divide amongst themselves, to the exclusion of the plaintiff and Dr. Jones or of the plaintiff alone, those shares which, if there had been a proportionate allotment amongst all the shareholders, would have fallen to Oxley. The plaintiff's claim to participate in the allotment of any shares which Oxley's refusal made available for allotment was at least as valid as the claim of any other shareholder.

Judgment for the plaintiff.

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[ROSE, J.]

March 5

SPARKS v. CONMEE.

Promissory Notes—Action against Executors of Maker—Notes Payable at Particular Place—Bills of Exchange Act, sec. 183—Non-presentment—Effect as against Maker—Interest—Claim over against Third Party—Promise—Defences to Claim on—Consideration—Bar by Limitations Act—Payments Made by Third Party—Starting Point for Statutory Period—Absence from Ontario—"Return" to Ontario—Sec. 52 of Act.

The plaintiffs' claim in this action was upon two promissory notes made by the original defendant in 1906. The action was begun in 1908; the original defendant died in 1913; and in 1914 the plaintiffs took out an order of revivor continuing the action against the deceased defendant's executors as defendants. Several defences were pleaded, but none of them was established by the evidence.

The notes were, in the body of them, made payable at a particular place. One of them was not presented for payment at that place and was not protested for non-payment. At the trial the defendants set up a defence, not pleaded, based upon sec. 183 of the Bills of Exchange Act, R.S.C. 1906, ch. 119:—

Held, that the effect of sub-sec. 2 of sec. 183 is that non-presentation of a note payable at a particular place is no answer to an action against the maker.

All the defences failing, there should be judgment for the plaintiff against the defendants for the amount of the two notes, with interest in respect of the note not presented as well as of the other.

Freeman v. Canadian Guardian Life Insurance Co. (1908), 17 O.L.R. 296, 302, 303, followed.

In October, 1917, the defendants issued a third party notice and claimed over against the third party upon an undertaking in writing given by him to the original defendant, in February, 1906, to pay the notes when due. One of the notes in question was payable in February, 1907, and the other in February, 1908. There were two defences to this claim—want of consideration for the promise, and that the claim was barred by the Limitations Act:—

Held, that the promise was not a guaranty to a creditor that a debtor will pay his debt, but a promise to the original defendant by the third party that, if the defendant gave certain promissory notes to H., the third party would pay them; the defendant did give them upon the faith of the promise, and the signing of them was consideration to support the third party's promise.

As to the defence under the statute, it was said that time was given to the third party, conditioned upon his paying in instalments, and that he continued to make payments for some time after the maturity of the note which fell due in February, 1908; and that, therefore, the defendant's right of action did not accrue; but, even if that was so, it must have accrued at the end of 1910, when the payments ceased; and, even if that later starting point was taken, the third party proceedings were begun too late.

Section 52 of the Limitations Act, R.S.O. 1914, ch. 75, was relied upon as extending the time for commencing the third party proceedings—the third party having left Ontario in 1910; but it was *held*, assuming that the third party was resident out of and absent from Ontario when the cause of action against him accrued, that, as he retained his commercial interests in and held land in Ontario, and in every month of the year 1911 spent some days in the Province, he “returned” to Ontario, within the meaning of sec. 52; and, even if the time for the commencement of the period of limitation had been suspended, the suspension ceased more than six years before the proceedings against him were initiated; and so the defendants’ claim against the third party failed.

Moore v. Balch (1902), 1 O.W.R. 824, followed.

Boulton v. Langmuir (1897), 24 A.R. 618, referred to.

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ACTION against James Conmee upon two promissory notes.

Upon the death of Conmee, the action was continued against his executors as defendants.

The defendants brought in F. H. Clergue as a third party and made a claim over against him.

February 19 and 20. The action and third party claim were tried by ROSE, J., without a jury, at a Toronto sittings.

Shirley Denison, K.C., and *W. J. Beaton*, for the plaintiffs.

D. L. McCarthy, K.C., for the defendants.

R. McKay, K.C., and *P. E. F. Smily*, for the third party.

March 5. ROSE, J.:—The plaintiffs’ claim against the defendants is on promissory notes made by James Conmee, deceased, of whose will the defendants are executors, in favour of William H. Hurley Jr. & Co., and by them endorsed. There were five of these notes, but sums have been paid on account, and there are in question only two notes, each for \$1,000, and each dated the 17th February, 1906, the one payable twelve months and the other two years after date.

The defendants’ claim against the third party is upon an undertaking in writing given by the third party to Conmee, dated the 13th February, 1906, to pay the notes when due.

Mr. Conmee had bought shares of the capital stock of companies in which Mr. Clergue was interested, and Hurley & Co., brokers, carrying on business in Philadelphia, were threatening

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to sue him, apparently in respect of obligations contracted in connection with the purchase. Mr. Clergue thought that the companies were under some moral obligation to Conmee to relieve him from liability, and was prepared to assume that liability himself, hoping that at some later time the companies would, in turn, indemnify him. Hurley & Co. were willing to accept in settlement of their claim notes for \$5,000, the payment of which was to be spread over a period of three years. The matter was explained to Mr. Clergue, and he signed the undertaking mentioned, which reads: "I undertake to pay when due the notes which you propose to give in settlement of the Hurley stock matter, amounting in all to \$5,000, on the terms of payment arranged" The notes were then signed by Mr. Conmee and endorsed by Mr. Clergue, and delivered to Hurley & Co. Apparently the note first falling due, \$500, was paid, and when this action was begun the claim was upon five notes, amounting in all to \$3,500; there was then still one note for \$1,000, payable three years after date, not due. Hurley & Co. were declared bankrupts, and the plaintiffs acquired the notes with other assets of the insolvent estate which they purchased.

Default having been made in payment of four of the notes, amounting in all to \$2,500, the plaintiffs wrote Mr. Clergue on the 16th November, 1907, advising him that they held the notes endorsed by him, and asking for payment. In May, 1908, the plaintiffs' solicitors threatened action. In June, 1908, the present action was begun against Conmee, but Clergue was not made a party.

After the commencement of the action, there were various communications between Mr. Clergue and the plaintiffs' solicitors and between the plaintiffs' solicitors and Conmee's solicitors; an examination of Conmee as a witness upon some motion which had been launched was adjourned from time to time, and there were promises from time to time by or on behalf of Clergue to make payments on account, and various sums were paid, the last payment being in 1910. Apparently nothing further was done in the action until November, 1912, when the statement of claim was delivered; the statement of defence was delivered in December of the same year.

Conmee died in 1913 or 1914, and in May, 1914, the plaintiffs took out an order of revivor continuing the action against the present defendants, the executors of his will. The third party notice was issued on the 13th October, 1917.

Many defences are pleaded to the plaintiffs' claim against the defendants. With these it is not necessary to deal in detail; it suffices to say that, in my opinion, none of them are established by the evidence. They include pleas that the notes were given in the settlement of differences upon dealings with shares upon margin, Hurley & Co. never having bought shares for Conmee; that Clergue was the real principal, to the knowledge of Hurley & Co., and of the plaintiffs, who acquired the notes after some of them had been dishonoured, and that Conmee was merely a surety and was released by time given to Clergue; that the plaintiffs made a settlement with Clergue, accepted his obligation instead of Conmee's, and, upon the footing of this settlement, accepted such payments as were made by Clergue.

Another defence, which was not pleaded but was strenuously urged, is based upon sec. 183* of the Bills of Exchange Act, R.S.C. 1906, ch. 119. The notes are, in the body of them, made payable at a particular place in Philadelphia. Some of them were presented there at maturity, and were protested for non-payment; but one of the two notes for \$1,000 each which are said to be still unpaid, and another note for \$500, were not so presented or protested. Mr. Denison takes the position that, as this defence is not pleaded, it ought not to be considered; and, if I was not bound by authority to hold that the effect of sub-sec. 2 of sec. 183 is that non-presentation of such notes is no answer to an action against the maker, I should have to consider his objection; but I think that what was said upon the point in *Freeman v. Canadian Guardian Life Insurance Co.* (1908), 17 O.L.R. 296, 302, 303, was part of the *ratio decidendi*, and not, as Mr. McCarthy argues, *obiter*, and that, notwithstanding all that has been said in other

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*183. Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place.

2. In such case the maker is not discharged by the omission to present the note for payment on the day that it matures; but if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the Court.

3. If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable.

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Provinces in favour of another interpretation of the sub-section, the point is not open in Ontario in a Court of first instance.

I think there is no defence to the plaintiffs' claim against the defendants.

The defences urged by the third party to the claim against him are two: want of consideration for the promise, and that the claim is barred by the Statute of Limitations. I think that the latter defence is fatal to the claim, and perhaps there is no object in my saying that I am inclined to think that the former is not well-founded: but I may point out that the promise sued upon is not a guaranty to a creditor that a debtor will pay his debt—it is a promise to Conmee by Clergue that, if Conmee gives certain promissory notes to Hurley, Clergue will pay them. Conmee did give them upon the faith of the promise. He may or may not have been under a legal obligation to pay money to Hurley, but he was under no obligation to sign notes, and the signing of them, while it may not have benefited Clergue, was, it seems to me, consideration to support Clergue's promise, which, until the notes were actually given, was without consideration and revocable. See *Means v. Whitney* (1904), 24 C.L.T. (Occ. N.) 93, affirmed on appeal, 237.

Then as to the Statute of Limitations. What Mr. Clergue undertook to do was to pay the notes when due. The last of those sued upon fell due in February, 1908, and the third party proceedings were not begun until the 13th October, 1917, more than 9 years thereafter. It is said that time was given to Clergue, conditioned upon his paying in instalments, and that he continued to make payments for some time after the maturity of the note which fell due in February, 1908; and that, therefore, Conmee's right of action did not accrue; but, even if that is so, it seems to me that it must have accrued at the end of 1910, when the payments ceased; and that, even if the later starting point is taken, the proceedings were begun too late.

Mr. McCarthy relies upon sec. 52* of the Limitations Act, R.S.O. 1914, ch. 75, as extending the time for commencing the

*52. If a person against whom any cause of action mentioned in sections 49 and 50 accrues is at such time out of Ontario, the person entitled to the cause of action may bring the action within such times as are before limited after the return of the absent person to Ontario.

third party proceedings. Mr. Clergue gave up his residence at Sault Ste. Marie, Ontario, in 1910, and moved to New York, and some two years later moved from New York to Montreal, where he still resides; so that, if the cause of action did not accrue until the cessation of the payments on account, he was resident out of, and, perhaps, actually absent from, Ontario when it did accrue; but he retained his commercial interests in Ontario, and held land in Ontario, and in every month of the year 1911 he spent some days in the Province, for instance, in April nine days, in July twelve days, in August seventeen days. He thus "returned" to Ontario, within the meaning of the words of the section; and, even if the time for the commencement of the period of limitation had been suspended, the suspension ceased more than six years before the proceedings against him were initiated: *Moore v. Balch* (1902), 1 O.W.R. 824; see also *Boulton v. Langmuir* (1897), 24 A.R. 618. The defendants' claim against the third party fails.

The solicitors for the plaintiffs and for the defendants have taken the accounts and have furnished me with a statement shewing that, if the plaintiffs are entitled to judgment for the amount of the notes with interest upon each of them, less the payments made on account with interest upon each amount paid, the sum as of the 27th February, 1919, is \$2,866.40; while, if no interest after maturity is calculated upon the notes which were not presented, the sum is \$1,999.10. I think that the result of the decision in *Freeman v. Canadian Guardian Life Insurance Co.*, *supra*, is that interest ought to be allowed upon the notes which were not presented as well as upon those which were.

There will, therefore, be judgment in favour of the plaintiffs against the defendants for \$2,866.40 with costs.

The defendants' claim against the third party will be dismissed with costs.

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[APPELLATE DIVISION.]

March 7.

HOPKINSON v. WESTERMAN.

Fraudulent Conveyance—Action to Set aside—13 Eliz. ch. 5—Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, sec. 1—"Creditors and Others"—Action by Plaintiff in Pending Action for Tort—Status—Proof of Fraudulent Intention—Claim as Creditor Based upon Small Claim in Contract—Insufficiency to Found Execution against Land—"Dignity of Court."

The statute 13 Eliz. ch. 5 and the Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, sec. 1, being for the protection of "creditors and others," it is not necessary that the plaintiff in an action to set aside a conveyance as fraudulent shall be a creditor at the time the action is brought; and where a conveyance of land was made for the purpose of defeating the expected execution in a pending action for tort, the fraudulent purpose being plain, the conveyance was set aside in an action brought before the recovery of judgment in the action for tort.

Per MEREDITH, C.J.C.P.:—It is not, and never was, the law that one whose claim arises out of a wrong cannot bring such an action until he has recovered judgment upon his claim.

Per MIDDLETON, J.:—One who has a claim for damages for tort, which has not passed into judgment, is within the statute of Elizabeth, but to succeed in his action must establish more than a preference—he must shew a fraudulent intention.

Remarks upon the proof of the existence of a fraudulent intention.

Ex p. Mercer (1886), 17 Q.B.D. 290, explained.

Semble, that the action could not be supported upon a claim for \$20, arising out of a contract: judgment for such an amount would not give any right to an execution against lands, and so the conveyance could not stand in the plaintiff's way.

Zilliox v. Deans (1891), 20 O.R. 539, referred to.

But an action based upon a claim for a small sum of money is not to be thrown out because "beneath the dignity of the Court."

AN appeal by the plaintiff from the judgment of CLUTE, J., at the trial, dismissing with costs an action brought on behalf of creditors of the defendant Albert Edwin Westerman, to set aside a conveyance of land by that defendant to his wife, the defendant Jane Alice Westerman, as being voluntary and fraudulent.

February 21. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. P. MacGregor, for the appellant, argued that it was established that the land was conveyed from husband to wife for the purpose of defeating the expected execution in the pending action against the husband for criminal conversation. The learned trial Judge erred in finding that the date of the impugned conveyance was the 12th January, 1916; the true date was the 12th January, 1917, and hence this action was brought within the 60 days fixed by the Assignments and Preferences Act—and the conveyance

was therefore presumed to be void as against the plaintiff, who was admittedly a creditor of Westerman at the date of the conveyance; and, being void as against the appellant as a creditor, it was void as against his subsequent debt by judgment in the criminal conversation action. The learned trial Judge also erred in depriving the appellant of the statutory right granted him as a creditor by the Assignments and Preferences Act—because of the size of the debt. The protection of the law is not limited to large debts, but is granted to any creditor, however small his claim. The appellant is entitled to succeed under the statute 13 Eliz. ch. 5; under that statute there need not be an existing debt in order that the transfer may be open to attack. That statute is for the protection of “creditors and others;” our Assignments and Preferences Act says “creditors” only. Reference to *Stileman v. Ashdown* (1742), 2 Atk. 477. At any rate, the appellant was a creditor for \$20.

J. G. O'Donoghue, for the defendants, respondents, contended that the appellant could not succeed because he was not a creditor of the grantor when the action was commenced; the appellant would have to bring a new action to enforce his rights. Any claim he had arose out of an action in tort, and not upon contract, and so he could not bring an action until he had recovered judgment upon his claim: *Ex p. Mercer* (1886), 17 Q.B.D. 290. The wife had an interest in the land before the making of the deed. The plaintiff could not support his action upon a claim for \$20, because a judgment for that amount would not give any right to execution against lands. In any event no claim of the plaintiff had passed into judgment when this action was commenced, and so he was not a “creditor” under our Act: *Gurofski v. Harris* (1896), 27 O.R. 201, 23 A.R. 717.

MacGregor, in reply, contended that the law was now practically the same in respect of claims for damages arising out of tort and claims arising out of contracts, so far as fraudulent conveyances were concerned: *Ashley v. Brown* (1890), 17 A.R. 500; *In re Maddever* (1884), 27 Ch. D. 523; *Edmunds v. Edmunds*, [1904] P. 362.

March 7. MEREDITH, C.J.C.P.:—It is very plain that the deed of the land in question, impeached in this action, was made

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for the purpose of defeating the expected, and impending, execution in the then pending action for criminal conversation: the grantee, who was, and is, the wife of the grantor—who was the defendant in that action—knew that it was pending, knew all the facts upon which it depended, and knew that the wrong done was done so openly that a substantial verdict against her husband, in it, was certain; and, as she also knew, he had no other property out of which the amount of the judgment could be realised. And the effect of the deed was merely to transfer the ownership from husband to wife, the family having substantially the same benefit of it as if it had remained in the husband and he had not made himself insolvent. The case against the man was so plain that, soon after the deed was made, judgment was entered up against him in the action for criminal conversation, for \$1,100, upon his consent.

The feeble efforts of the wife to shew that she had an interest in the land before the making of the deed, because she was saving in the moneys he received from her husband for housekeeping purposes, and because she sometimes went out working, really only makes plainer the purpose of defeating the claim in the criminal conversation action: in no case ever tried before me was there a less substantial claim of this character. In fact the case is one of the plainest of a fraudulent purpose.

But it is contended that this action must fail on the ground that the plaintiff was not a creditor of the fraudulent grantor when it was commenced, that he must bring a new action to enforce his rights: that any one who has a sufficient claim arising out of contract may bring such an action as this before he has recovered a judgment upon his claim; but that no one whose claims arise out of a wrong can bring such an action until he has recovered judgment upon his claim. That, however, is not and never was, in my opinion, the law: and there is no reason why it should be, no reason why claims *ex delicto* and claims *ex contractu* should not be upon precisely the same plane in this respect—though upon the question of fact, whether the intention was or was not to defeat, hinder, or delay the claimant, it may be a matter of consequence what the character of the claim was and what the prospects of success in it, as is exemplified in the mariner's case—*Ex p. Mercer*, 17 Q.B.D. 290.

In a somewhat ancient case—*Lewkner v. Freeman* (1699), 1 Eq. Cas. Abr. 149—it seems to have been said that debts founded *in maleficio* could, before judgment, be preferred to other debts. But the right to prefer was not so limited. The rule is, I think, rightly stated in the *Cyclopædia of Law and Procedure* (“Cyc.”), vol. 20, p. 430, thus: “The well-nigh universal rule is that claims for damages arising from torts are within the protection of the statutes against fraudulent conveyances.” It is difficult to see how it could be otherwise under the statute of Elizabeth, upon which this action is based, the words of that Act (13 Eliz. ch. 5, sec. 1*) being: “For the avoiding and abolishing of feigned, covinous and fraudulent . . . conveyances . . . devised and contrived . . . to delay, hinder or defraud creditors and others of their just and lawful actions . . .” What “others” can it be suggested can better come within the meaning of that word than such others as have actions pending in which they are sure to recover large damages? I know of none.

The case seems to me to be a plain one for directing that judgment be entered for the plaintiff in the usual form applicable to the case: see *Reese River Silver Mining Co. v. Atwell* (1869), L.R. 7 Eq. 347.

I would allow the appeal and direct that judgment be entered accordingly, with costs of the appeal and of the action.

The plaintiff sought also to support this action upon a claim for \$20, arising out of a contract: but it is insupportable in that way; judgment for such an amount would not give any right to execution against lands, and so the deed could not stand in the plaintiff’s way; and, if it did, the case would be an extraordinary one in which it could be held that such a conveyance as that in question was really made to defeat such a claim; few if any men are without personal property sufficient to satisfy such a small amount; beside which there are the judgment summons provisions of the Division Courts Act. But such an action could not be thrown

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*Section 1 of the Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, provides: “Every conveyance of real property or personal property and every bond, suit, judgment and execution at any time had or made or at any time hereafter to be had or made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures shall be null and void as against such persons and their assigns.”

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out because the amount involved is beneath the dignity of the Court; the Court's dignity is best upheld when all rights properly presented are enforced. Substantial rights are preserved by the Rules respecting scales and set-offs of costs.

BRITTON, J., agreed with MEREDITH, C.J.C.P.

RIDDELL and LATCHFORD, JJ., agreed in the result.

MIDDLETON, J.:—Appeal by the plaintiff from the judgment of Clute, J., dated the 20th January, 1919, dismissing the action.

The action is on behalf of creditors of the defendant Albert Edwin Westerman to set aside a conveyance of certain lands by Westerman to his wife, the defendant Jane Alice Westerman, dated the 12th January, 1917.

The plaintiff claims to be a creditor of Westerman for \$20, being Westerman's share of the cost of a fence between the premises of the parties.

On the 18th December, 1916, the plaintiff sued Westerman for criminal conversation.

On the 13th March, 1917, the writ in this action was issued.

On the 22nd May, 1917, the plaintiff recovered judgment in the action for criminal conversation, for \$1,100.

The plaintiff based his case upon the existence of the debt of \$20 at the time of the conveyance, and sought to use the pending action for damages as indicating a fraudulent intent. The learned trial Judge in dismissing the action said that, so far as it was based on the \$20 claim, it was beneath the dignity of the Court, and that, so far as the claim was based on the pending action for criminal conversation, there was no debt and no fraud.

I find myself unable to agree either with the contention of the plaintiff or the view of the learned Judge.

First as to "the dignity of the Court." This most unfortunate expression had its origin in the Court of Chancery and was quite unknown in the Common Law Courts, where actions for the recovery of nominal damages for the vindication of rights were common. Under Lord Bacon's Ordinance of the 9th January, 1618, the Court of Chancery was forbidden to "take jurisdiction in suits under the value of £10;" and, as our Court of Chancery

was by statute given the same powers as those possessed by the English Court in 1837, this limitation was introduced into the Province: *Gilbert v. Braithwaite* (1871), 3 Ch. Chrs. 413. Notwithstanding the provisions of the Judicature Act, this limitation still continues, for that Act did not confer new jurisdiction but gave to the Supreme Court the jurisdiction formerly possessed by either the Court of Chancery or the Common Law Courts: *Westbury-on-Severn Rural Sanitary Authority v. Meredith* (1885), 30 Ch. D. 387 (C.A.)

Thus this limitation of jurisdiction is based on an enactment of the Legislature, and not upon any idea of the Court as to its own dignity. A practice had grown up of refusing to entertain an appeal when less than \$40 was involved: *Re McRae and Ontario and Quebec R.W. Co.* (1887), 12 P.R. 327, where it is referred to (p. 329) as a "salutary rule" which "should not be relaxed." This practice was put to an end by the decision in *Clarke v. Creighton* (1890), 14 P.R. 100, where Armour, C.J., says (p. 102): "We esteem it not beneath the dignity of this Court to determine all matters that come properly before us, be they never so small in amount, according to the best of our skill and knowledge, for our duty is 'to do equal law and execution of right to all the Queen's subjects, rich and poor, without having regard to any person'."

So far as the claim is based upon the \$20 debt, there is another and far more serious objection indicated in *Zilliax v. Deans* (1891), 20 O.R. 539. A transfer of property can be regarded as fraudulent as against a creditor only where the property can be reached by that creditor. So a transfer of land cannot be attacked by a creditor whose claim is less than \$40, for an execution against lands cannot be issued upon a judgment for less than this sum. For the same reason, the transfer of chattels exempt from seizure is not liable to attack: *Osler v. Muter* (1892), 19 A.R. 94.

But in order to make a transaction open to attack under 13 Eliz. ch. 5, it is not necessary that there should be an existing debt. The statute is for the protection of "creditors and others," and in this respect differs from our Ontario statute, which avoids preferential transactions at the instance of "creditors" only (Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 5.)

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Ever since *Longway v. Mitchell* (1870), 17 Gr. 190, there has been no room for doubting that a class action will lie attacking a conveyance as fraudulent, either under the statute of Elizabeth or under the Provincial statute, without awaiting the recovery of judgment and issue of execution. When the attack is under the Provincial Act, the plaintiff must prove that he is a "creditor" within the meaning of that Act, and it is now clearly determined that one who has a claim for damages is not a creditor until his claim passes into a judgment: *Ashley v. Brown*, 17 A.R. 500; *Gurofski v. Harris*, 27 O.R. 201, 23 A.R. 717.

But, as already said, it is also established that one who has a claim for damages for tort, which has not passed into judgment, is within the statute of Elizabeth, but to succeed the plaintiff must establish more than a preference—he must shew a fraudulent intention: *Ashley v. Brown*, *supra*; *Gurofski v. Harris*, *supra*; *Mulcahy v. Archibald* (1898), 28 Can. S.C.R. 523. The existence of the debt due to the preferred creditor in such cases shews that there was not an intention to defraud, the mere intention to prefer not being made unlawful by that statute. See also *Carr v. Corfield* (1890), 20 O.R. 218. The fraudulent intention necessary to avoid the conveyance must be established by evidence in each case.

In *Ex p. Mercer*, 17 Q.B.D. 290, a defendant in an action for breach of promise made a settlement of an unexpected legacy received pending the action. He had other property, and said that at the time of this settlement he had not any thought of the pending action, and this statement was believed. In the result a large verdict was found against him. This is described (p. 300) as "a startling verdict," which he "should not have anticipated," and the mere fact that the assets remaining were not sufficient to satisfy it, it was held, did not compel the Court to find an intention to defraud when satisfied upon the evidence that no such intention in fact existed. This case is not authority for any wider proposition. But, when the defendant knows that he has no defence, and that the recovery of judgment is imminent, and the conveyance is of all his property, the situation is widely different. It is then very easy to establish the fraudulent nature of the transaction—indeed it may be the necessary inference from the bare facts. Here we do not need to go so far, as, on the evidence of the wife, the nature of the deed is disclosed:—

"I said to my husband, 'I think I have a right to go in for alienation of husband's affection as well as what he had done for his wife,' and of course I expect he thought he was doing what he should by letting me have the home." "Then of course he sued Mr. Westerman and I was vexed . . . and of course my husband had it made over to me then." "Q. You knew of course that Mr. Westerman did not have any other property in the world but this? A. Yes. He told me he would fix it up the best he could and he thought I should have it."

This and the admitted facts establish a clear case of an intention to defraud within the statute of Elizabeth.

Mr. MacGregor urged that the statutory presumption found in the Provincial Act, R.S.O. 1914, ch. 134, sec. 5 (4), where the transaction is attacked within 60 days, applied to this case. Manifestly it has no application where the transaction can only be reached under the earlier enactment. Fortunately for his client, the case is, in my view, established without resorting to this.

The appeal should be allowed and the conveyance set aside. Costs to be added to the debt. I would not make a personal order for costs against the wife.

Appeal allowed.

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March 7.

Company—Powers of—Incorporation under Companies Act of Canada, R.S.C. 1906, ch. 79—Company Acting as Agent for Trading Firm in Scotland—Agreement between Company and Firm for Purpose of Securing Firm in Respect of Credit Given—Allotment of Majority of Shares to Member of Firm—Deposit of Amount Equal to Par Value of Shares with Firm—No Actual Money Passing—Payment for Shares—Loan to Shareholder—Sec. 29 (2) of Act—Partnership Firm Separate Entity in Scottish Law—Lex Domicilii.

The judgment of MASTEN, J., 43 O.L.R. 617, was reversed, and the action was dismissed.

Held, by MEREDITH, C.J.C.P., and BRITTON, J., that, the Act under which the company was incorporated, the Companies Act of Canada, R.S.C. 1906, ch. 79, requiring a real subscription and real payment for the shares of the capital stock of the company, the plan devised for giving the defendant W. S. the control of the company as if the holder of more than one-half of its capital stock, was one which the company could not lawfully act upon; it was *ultra vires*; and the defendant W. S. could not retain the position of a paid-up shareholder; nor could the company put him in the position of the holder of stock upon which nothing had been paid, for the stock was not so taken—it was taken only as a part of the whole plan; and neither the company nor the Court had power to make or enforce against him a new and different contract.

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If the transaction could be regarded as *intra vires*, there was no loan to W. S. nor to W. S. & Son; if there were a loan to a firm of which W. S. was a member, it would not come within the prohibition of sec. 29 (2) of the Act; and the law recognises the separate existence of co-partnership firms such as W. S. & Son.

Per RIDDELL, J.:—The shares allotted to W. S. were paid-up shares—the transaction constituted payment in full for the shares. But the real question was whether the agreement was *intra vires*. The deposit of the money with the firm of W. S. & Son was not a loan to a shareholder, within the meaning of sec. 29 (2) of the Act; and the firm was not the shareholder. In Scotland a firm is a legal person distinct from the partners of whom it is composed (53 & 54 Vict. ch. 39, sec. 4 (2) (Imp.)); and the status of a partnership in Scotland determines its status in Ontario.

Per LATCHFORD, J.:—The plan according to which the \$51,000 was deposited with W. S. & Son was not *ultra vires* of the company. The shares allotted to W. S. were to be regarded as paid-up; but the deposit of the \$51,000 was not a loan to a shareholder—the firm was not a shareholder—and the provisions of sec. 29 (2) were not contravened.

AN appeal by the defendants from the judgment of MASTEN, J., 43 O.L.R. 617.

February 18 and 19. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

D. L. McCarthy, K.C., and *A. W. Langmuir*, for the appellants, argued that the Judge below erred in finding that the deposit made by the defendants J. B. Henderson and Company Limited with the defendants William Strang & Son, under the agreement of the 24th August, 1910, was in effect a loan by J. B. Henderson and Company Limited to one of its shareholders, and in directing payment by the defendants William Strang & Son of the sum of \$51,000 and interest. If, in any event, the agreement should be declared *ultra vires* of the company, the by-law authorising the agreement was likewise invalid, and the division of the shares of stock into common and preferred was illegal, and the plaintiff as a preferred shareholder should be ordered to repay to the defendants J. B. Henderson and Company Limited all dividends which she had received in respect of her preferred shares. A partnership in Scotland is a distinct entity, and the law of Scotland governs: *Lindley on Partnership*, 8th ed., p. 923; *Dicey, Conflict of Laws*, 2nd ed., p. 538; *Ogden v. Ogden*, [1908] P. 46. The transaction did not constitute a loan.

I. F. Hellmuth, K.C., and *S. J. Birnbaum*, for the plaintiff, respondent, contended that the agreement and loan were illegal. The trial Judge found that the shares were not the property of William Strang & Son, but of William Strang. The agreement

was not binding on the plaintiff. Counsel referred to *Baillie v. Oriental Telephone and Electric Co. Limited*, [1915] 1 Ch. 503; *In re Doetsch*, [1896] 2 Ch. 836; *Bullock v. Caird* (1875), L.R. 10 Q.B. 276.

McCarthy, in reply.

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March 7. MEREDITH, C.J.C.P.:—The plan devised, and carried into effect, by the two persons most substantially concerned—with the concurrence of every one else having any interest in the company, however comparatively insignificant it might be, and to which no objection of any character was made by any one until recently, though it has been in force, and constant operation, for upwards of 8 years, and to which objection is made now really only because of matters personal to the plaintiff's husband, one of the substantial owners of the concern—seems to have been a plan well suited to the purposes of the business of the company and of all persons who were and are its shareholders; though as to possible future shareholders and creditors it might be very different.

The main feature of the plan, so far as the disposition of this appeal is affected, was: that the defendant William Strang should have a controlling interest in the company as if the holder of more than one-half of its capital stock, and as if fully paid-up, though in reality nothing was actually paid by him for the stock. The form of payment gone through was really nothing but a form; the cheque sent in payment was never cashed by any one and was never intended to be cashed by any one.

The Act requires a real subscription and real payment for the shares of the capital stock of the company. There was only an unreal, a fanciful at most, subscription and payment for the 51 shares in question. It was entirely a matter of form—pantomime one might say. No money was ever paid to the company for the shares; and none was ever to be paid.

No deposit of the \$51,000, or of a farthing of it, was ever made with the Strangs' co-partnership firm; nor ever was to be made. No dividends were really ever to be paid upon the stock; nor was any interest ever to be paid upon the imaginary deposit. No security was given or was ever to be given by the Strangs' firm for the \$51,000 of the company's money lying idle without interest

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in their hands—in imagination. The money was never to be repaid to the company: that is plain, for, if it were, the real owner of it—Strang—would get neither dividends nor interest upon it. And it is all very well to say now, for the purposes of this argument, that perhaps creditors of the company might reach it and perhaps in case of a winding-up it might be reached; but if any such events were reached a very different story would be told, and would probably save it from all claimants—that is, the true story that it was never to be actually paid; the whole scheme was to give Strang a controlling voice in the concern without in reality having bought or paid for any shares in the stock of the company.

Though it was the scheme of every one concerned in this action and acted upon for upwards of 8 years, and though beneficial to them during all that time and likely to be as beneficial in the future if the plaintiff's husband would perform his part of it, it cannot stand if it were *ultra vires* the company, which is a company incorporated under the provisions of the Companies Act of Canada. The rights and interests of present shareholders are not alone concerned, the rights and interests of possible future shareholders and creditors must, equally, be considered.

That the plan was one which the company could not lawfully act upon I can have no doubt; the Act (R.S.C. 1906, ch. 79, secs. 58 *et seq.*) requires payment for stock, payment with interest at 6 per centum per annum upon all arrears; and, as it seems to me, it is a waste of energy to contend that there was, or was intended to be, any kind of payment in this scheme: the defendant Strang was to have the position, or power, of a paid-up stockholder without having paid anything in any real way for the stock; but there was nothing fraudulent or morally wrong in that, because he was not to be paid dividends, nor was he to obtain any other money advantage, through such nominal ownership.

The plan being *ultra vires*, the defendant Strang cannot retain the position of a paid-up stockholder; nor, on the other hand, can the company put him in the position of the holder of stock upon which nothing has been paid, for the stock was not so taken, it was taken only as a part of the whole plan; neither the company, nor the Court, has any power to make, or enforce against him, a

new and different contract; if the plan fall to the ground, it must fall altogether. As was said in *Carling's Case* (1875), 1 Ch.D. 115, 122, and, as I think, must occur to any one considering the subject: there was no contract to take any but fully paid-up shares; are you not altering that if you fix the subscriber with unpaid shares?

The result is, if these views are right, that the plaintiff's action should have been dismissed: I would, therefore, allow this appeal and direct that the action be dismissed, both with costs.

It may follow that the company, based so much on that *ultra vires* scheme, must for all practical purposes come to an end; but that is a stage which it had reached before this action was commenced, owing to the quarrel between the two principals concerned in it, resulting, for one thing, in the plaintiff's husband leaving, apparently without leave, the employment of the company and setting up a business in opposition to it.

And I feel bound to add that in any case I should have been unable to agree in the conclusion of the trial Judge that the scheme in question comprised a loan of the amount of the nominal value of the Strang stock to the defendant Strang: no loan was intended, nor any loan effected. How could the company recover the amount from him as money payable by him to them for money lent by them to him? If the plan were *intra vires*, the imaginary money—there was no real money in the transaction—should remain with the Strang firm under the terms of the agreement embodying that plan: if the money had become the money of the company, and if for any reason the company were entitled to recover it, it would not be as money lent but as money payable under the terms of the agreement, or as money payable by the firm to the company for money received by the firm for the use of the company. Nor am I prepared to assent to the proposition that a loan, in good faith, to a co-partnership firm, of which a shareholder of the company is a member, is within the statutory prohibition against making any loan to a shareholder of the company; apart from such a provision there would be the right; in curtailment of it Parliament has not said that there shall be no loan to a company incorporated, or unincorporated, or co-partnership firm, of which the shareholder is a member, and we have no right to add to its prohibitions. It seems to be admitted that a loan to a "one-man corporation," of which the shareholder is the

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one man, would be unobjectionable, yet in fact it might be far more dangerous than if the loan were to a co-partnership firm or company of unlimited liability.

Nor am I at all able to agree in the notion that the law does not recognise—and if it did not Parliament does—Imperial, Federal, and Provincial; Imperial providing that Scottish firms such as the Strang company partnership are legal entities—the separate existence of co-partnership firms; that they are in no sense legal entities. They may sue and be sued; execution may issue against them or in their favour; their separate existence is recognised, and separate provision is made for the payment of their debts; so that in most of their attributes they are much the same as incorporated companies of unlimited liability; and I can imagine no good reason for lawyers shocking business men and business methods with fine-drawn notions regarding the want of legal existence of concerns the actual existence of which is ever before the eyes of every one.

BRITTON, J., agreed with MEREDITH, C.J.C.P.

RIDDELL, J.:—This is an appeal from the judgment of Masten, J., reported in (1918) 43 O.L.R. 617.

The argument upon the appeal took a very wide range, the common and statutory law of Scotland being included. In the view I take of the case the facts are these:—

The firm of J. B. Henderson & Co., of which J. B. Henderson was the sole partner, was carrying on business as a dry goods agent in Toronto, and was the agent of the manufacturing firm of William Strang & Son, of Glasgow, Scotland, composed of four brothers (now three), including William Strang. The Toronto firm was both purchasing and selling agent, and received large credits from the Glasgow firm. In 1909, Henderson was in ill-health, and, William Strang being in Toronto, they arranged to form a joint stock company, J. B. Henderson and Company Limited, to take over the Henderson business. The company was to have \$100,000 capital, 1,000 shares of \$100 each. Henderson was to receive shares to the amount of \$3,000 for his stock in trade and \$20,000 for his goodwill; his wife, the plaintiff, to invest \$1,000; McJ., a traveller, \$5,000; the cashier, \$100; Miss

S., \$100. Strang was to "invest \$51,000," to be deposited with his firm in Glasgow as security against any advances they were to make for payment of goods sold through them and to pay for goods supplied by them—the Glasgow firm to receive interest from the Toronto company at 6 per cent. for any such sums. Then Strang was not to be paid any interest on his shares, and his firm not to pay any interest on the \$51,000 to be deposited by them. The \$51,000 stock was to be issued as paid-up, but the amount was to be at once deposited with the Glasgow firm. The object of the arrangement was to secure to the company the best buying terms in the European market by prompt payment for goods bought and also to save exchange.

The charter was obtained, William Strang applying for it through his attorney, Mr. G., and being allotted one share. Henderson was allotted 235 fully paid-up shares (the 22nd November, 1909). Strang was elected a director.

Then the problem of how to carry out the proposed \$51,000 transaction so that Strang might be safe and the law of companies satisfied, arose. In view of the arrangement already made, the company allotted the whole 510 shares to Strang, but he would not accept them except as fully paid-up shares, and the agreement was drawn up and executed which appears in 43 O.L.R. 619, 620. Clause (3) of the by-law authorising this contract reads:—

"That as soon as William Strang shall have paid in full the amount payable in respect of the 510 shares subscribed by him, the sum of \$51,000 be remitted to William Strang & Son, of the city of Glasgow, merchants, to be held by the said firm subject to the order of the company pursuant to the agreement which is appended, and the execution thereof under the seal of the company be and is hereby authorised."

This was approved in general meeting, at which Strang was present, and Mrs. Henderson, the plaintiff, was represented by proxy. The same by-law made Strang's shares common stock and the remainder preference stock, with a fixed cumulative dividend of 6 per cent.

Strang sent out a cheque for a sum in sterling money, which it was believed would realise \$51,000. This was at once endorsed on behalf of the company and sent to the Glasgow firm. This scheme was adopted to save exchange etc.

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The company allotted the \$51,000 stock as paid-up stock—all parties considering the transaction as a payment to the company by Strang of \$51,000 and a deposit by the company with the Glasgow firm of the same sum.

This took place in the summer of 1910, and there was no objection taken until some years later. Henderson fell out with the Glasgow people—friction arose—and this action was brought in July, 1916, for the relief mentioned in the report, 43 O.L.R. 617, where the result at the trial is given. The defendants now appeal.

The first question for determination is whether the transaction constituted a payment in full of the shares. Further consideration of the facts and the law has convinced me that my learned brother is right in holding the \$51,000 shares paid-up.

Apart from the fact that our present statute, R.S.C. 1906, ch. 79, is different from the former statute, R.S.C. 1886, ch. 119, sec. 27, this seems sufficient payment.

The transaction is not, baldly, "You give me paid-up stock and I will give you credit," but "I will pay you \$51,000 on condition that you will at once deposit the sum with my firm on a special account." The result is that, had the transaction been carried out precisely, Strang would have paid the company \$51,000 in cash, and the company would have at once handed the same sum to Strang for his firm. The setting off (so to speak) of the one payment against the other, so that there is no actual passing of money by one to the other, is considered sufficient in *Spargo's Case* (1873), L.R. 8 Ch. 407, approved in *Larocque v. Beauchemin*, [1897] A.C. 358. "If bank-notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back" (p. 365 *ad fin.*), seems to be the test.

I am, however, unable to attach great importance to this question. If we should hold that the stock was not paid-up, the logical result would be that the money would be paid to the company, and by the company at once to the Glasgow firm, unless the agreement is illegal, so that the money could not be "legitimately" so paid. If then the agreement is valid, the whole effect of such a holding would be to cause an idle but expensive form to be gone through. The Court does not lend its assistance to such proceedings.

Moreover, the transaction has been acquiesced in, acted upon, made the basis of business, and it would be inequitable now to set it aside, if the agreement is *intra vires*: Brice on Ultra Vires, 3rd ed., p. 612.

The real question, as it seems to me, is, whether the agreement is *intra vires*. In this I entirely agree with the learned trial Judge in his conclusions under heads (b) and (c), but I am unable to agree as to (e).

I do not think that the deposit under such a contract as this is a loan within the meaning of R.S.C. 1906, ch. 79, sec. 29 (2).^{*} No doubt it has been held in such cases as *Carr v. Carr* (1811), 1 Mer. 541 (note), *Devaynes v. Noble* (1816), 1 Mer. 530, 568, *Sims v. Bond* (1833), 5 B. & Ad. 389, *Foley v. Hill* (1844), 1 Ph. 399, that an advance to or deposit with a banker is in truth a loan and he becomes at once a debtor for the amount. But that is because he is debtor for the amount and it can be reclaimed at once. Here the amount cannot be reclaimed; it is not a debt, it is a deposit on special terms.

Moreover, the firm is not the shareholder. We need not consider what the legal status of a partnership and its members might be in the absence of a statute. The Imperial Act, 1890, 53 & 54 Vict. ch. 39, sec. 4 (2), expressly enacts: "In Scotland a firm is a legal person distinct from the partners of whom it is composed." (This is but a restatement in statutory form of the Common Law of Scotland, which differs from ours. See Bell's Principles of the Laws of Scotland.) The status of a partnership in Scotland determines its status in Ontario. The Courts have not been quite uniform in decision, but "a comparison of more or less recent cases exhibits a distinct and increasing tendency on the part of English Courts to approximate in practice to the theory that a person's status is governed by his *lex domicilii*:" Dicey, Conflict of Laws, 1896, p. 480, and notes; cf. Bigelow's edition of Story's Conflict of Laws (8th ed., 1883), sec. 320 a.

The deposit with the Glasgow firm was no more a deposit with William Strang than the dealings of Salomon & Company Limited were those of Aron Salomon: *Salomon v. Salomon & Co.*, [1897] A.C. 22.

^{*}2. The company shall in no case make any loan to any shareholder of the company.

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A loan to the Strang firm was not then, in my opinion, a loan to the separate individual William Strang. It is not material that William Strang made or might make a profit out of the transaction. Shareholders are not prevented from obtaining casual advantages from their position, and the Court should not impose a prohibition where the statute has not.

I agree with the learned trial Judge in his conclusions (d) and (f).

I would allow the appeal and dismiss the action, both with costs.

LATCHFORD, J.:—I have had the advantage of reading the judgments of my Lord the Chief Justice and of my brother Riddell, and, while I agree in the result, I wish to guard myself against assenting to the proposition that the plan according to which the \$51,000 was deposited with the Glasgow firm was *ultra vires* of the company. I regard the stock subscribed for by William Strang and allotted to him as having been fully paid-up. The agreement by which the amount which he paid for his stock was deposited with his firm was undoubtedly greatly to the advantage of the company, and was for good consideration. I do not, however, regard the \$51,000 as a loan to one of the company's shareholders—the Scottish firm not being a shareholder of the company—and the provisions of R.S.C. 1906, ch. 79, sec. 29 (2), were not, in my opinion, contravened.

Appeal allowed.

[MASTEN, J.]

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March 13.

CITY OF TORONTO v. CANADIAN OIL COMPANIES LIMITED.

*Municipal Corporations—Powers of Licensing and Regulating—By-law—
“Public Garage”—What Constitutes—Municipal Act, sec. 406a., para.
4 (a) (Municipal Amendment Act, 1914, sec. 13).*

Section 406a. of the Municipal Act, as enacted by sec. 13 of the Municipal Amendment Act, 1914, authorises the passing of by-laws by the councils of cities (4) “for licensing and regulating the owners of public garages . . .” By cl. (a) of para. 4: “For the purpose of this paragraph, a public garage shall include a garage where motor-cars are hired or kept or used for hire, or where such cars, or gasoline, oils, or other accessories are stored or kept for sale.” In the exercise of the power conferred by sec. 406a., the council of the plaintiffs, a city corporation, passed a by-law enacting “that no person shall carry on the business of a public garage as defined by the Municipal Amendment Act, 1914, unless and until he shall procure a license,” etc.:

Held, that the defendants, whose business, carried on in a building, alleged by the plaintiffs to be a “public garage,” consisted in supplying gasoline and air to persons using automobiles, and whose building did not afford storage for automobiles, were not carrying on the business of a public garage within the meaning of the statute and by-law.

Definition of “garage.”

ACTION for a declaration that the defendants were operating a public garage in the city of Toronto, without a license, in contravention of by-laws Nos. 7466 and 7467 of the city corporation, the plaintiffs, and for an injunction restraining the defendants from continuing so to operate until they should have obtained a license.

January 28. The action was tried by MASTEN, J., without a jury, at a Toronto sittings.

C. M. Colquhoun, for the plaintiffs.

R. H. Parmenter, for the defendants.

March 13. MASTEN, J.:—Among other defences the defendants set up that the business which they are carrying on is not the business of conducting a public garage.

The power of the plaintiff corporation to pass a by-law rests upon sec. 406a. of the Municipal Act, R.S.O. 1914, ch. 192, as enacted by the Municipal Amendment Act, 1914, 4 Geo. V. ch. 33, sec. 13, as follows:—

406a. By-laws may be passed by the councils of cities . . .

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"4. For licensing and regulating the owners of public garages, and for fixing the fees for such licenses, and for imposing penalties for breaches of such by-law and for the collection thereof.

"(a) For the purpose of this paragraph, a public garage shall include a garage where motor-cars are hired or kept or used for hire, or where such cars, or gasoline, oils, or other accessories are stored or kept for sale."

In pursuance of the power so conferred, the plaintiffs passed by-law No. 7466, enacting "that no person shall carry on the business of a public garage as defined by the Municipal Amendment Act of 1914, unless and until he shall procure a license so to do, and every person so licensed shall be subject to the provisions of this by-law." The by-law then proceeds to set forth in detail the method of licensing.

The question turns largely on the meaning of the term "public garage" as interpreted by the Municipal Act. It is to be observed that the Legislature has defined a "public garage" as a "garage" used for certain purposes specified in the section. The intention of para. 4 (a), quoted above, appears to have been to make plain the distinction between a public garage and a private garage, without in any way indicating what kind of a building or what kind of a business constitutes a garage. It therefore becomes necessary to ascertain the meaning of "garage" in its ordinary acceptance and use. The word is taken from the French, and the definition of "garage" to be found in Littré's dictionary is as follows:—

"1. Terme de navigation. Action de faire entrer les bateaux dans une gare.

"2. Terme de chemin de fer. Action de garer les wagons. Voie de garage, voie dans laquelle on doit garer, mettre à l'abri ou en reserve les wagons de service, etc. L'entretien des voies de garage dans un chemin de fer."

In the Century Dictionary "garage" is defined as follows:—

"[F. *garage*, keeping under cover, a place for keeping (boats, wagons, automobiles) under cover—*garer*, keep under cover, keep, guard, var. of OF. *garir*, keep: see *garret*.] A station in which motor-cars can be sheltered, stored, repaired, cleaned, and made ready for use; also, a place of private storage for a motor-car: a stable for motor-cars."

In the last edition of the Standard Dictionary "garage" is defined as "a building for the storage of automobile vehicles," and in Webster's New Dictionary as "a place for housing automobiles."

The matter has been considered in some of the American cases. In the case of *Smith v. O'Brien* (1905), 94 N.Y. Supp. (128 N.Y. St. Repr.) 673, it is said ". . . The garage is the modern substitute of the ancient livery stable . . ." "The garage keeper is like unto the livery stable keeper . . ."

In *Diocese of Trenton v. Toman* (1908), 74 N.J. Eq. 702, 714, it is said: "These garages occupy with relation to automobiles the same place that stables do with regard to horses . . ."

The evidence establishes, and I find as a fact, that the business carried on by the defendants consists in supplying, to persons using automobiles, gasoline and air, and the defendants' building, at the premises in the pleadings mentioned, does not and cannot afford storage for automobiles.

In order that the section of the Municipal Act above quoted may apply to such a business, it would be necessary to insert in para. 4 (a), above quoted, the words "any building" so that the concluding words would read as follows: "Or *any building* where such cars, gasoline, oils or other accessories are stored or kept for sale," instead of which it reads in effect: "or any garage where such cars, gasoline, oils or other accessories are stored or kept for sale."

Having regard to the definitions quoted above, it seems to me that no building or business can properly be designated as a garage unless it is adapted to the storage of automobiles and is used for that purpose. I find as a fact that the defendants do not, in respect to the matters in the pleadings mentioned, conduct or carry on the business of a public garage.

Action dismissed with costs.

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[APPELLATE DIVISION.]

March 14.

WHIMBEY v. WHIMBEY.

Husband and Wife—Alimony—Charge of Adultery Made against Wife—Attempt to Establish by Evidence—Ground for Awarding Alimony—Cruelty.

Pleading adultery of the wife as an answer to an action for alimony and unsuccessfully attempting to support the plea by evidence is not in itself a ground for awarding alimony. Alimony might be granted if it were shewn that the wife's health was affected by the conduct of the husband in making the charge—that might be cruelty in a legal sense.

Russell v. Russell, [1897] A.C. 395, followed.

Lovell v. Lovell (1906), 13 O.L.R. 569, distinguished.

Jeapes v. Jeapes (1903), 89 L.T.R. 74, referred to.

Semble, per MIDDLETON, J., that the adultery of the wife had been in this case adequately proved.

APPEAL by the plaintiff and cross-appeal by the defendant from the judgment of MEREDITH, C.J.C.P., at the second trial of an action for alimony, in favour of the plaintiff for the recovery of alimony at the rate of \$15 a month from the date of the trial.

At the first trial, RIDDELL, J., gave judgment for the plaintiff. Upon the defendant's appeal, a new trial was ordered: *Whimbey v. Whimbey* (1918), 14 O.W.N. 128.

The plaintiff appealed from the judgment of MEREDITH, C.J.C.P., upon the ground that the allowance was inadequate, and that alimony should run from the date of the issue of the writ of summons; and the defendant appealed upon the ground that, upon the facts disclosed, the plaintiff was not entitled to alimony at all.

February 26 and 27. The appeal and cross-appeal were heard by MAGEE and HODGINS, JJ.A., MIDDLETON, J., and FERGUSON, J.A.

T. H. Lennox, K.C., and *C. W. Plaxton*, for the plaintiff, argued that this was a case in which alimony should be awarded, and asked for a reference to fix the proper amount. It should be given from the date of the issue of the writ and should be for an adequate sum. An action brought by the present defendant against one Alderson, for alienation of the wife's affections, was based on the same alleged facts as are in question here, and has been dismissed, so these matters are now *res judicata* between the parties. In any case, the marriage of the parties

creates an oblivion of the past. They referred to Halsbury's Laws of England, vol. 13, p. 332 (para. 465); *Hedden v. Hedden* (1870), 21 N.J. Eq. 61; *Bray v. Bray* (1849), 6 N.J. Eq. 628; Browne on Divorce and Alimony, p. 57. [HODGINS, J.A., referred to *Walker v. Walker* (1898), 77 L.T.R. 715.] They also referred to Gemmill on Divorce, p. 111; *Ney v. Ney* (1913), 4 O.W.N. 935, 1636, 11 D.L.R. 100, 12 D.L.R. 248; *Ferris v. Ferris* (1883), 7 O.R. 496; Halsbury's Laws of England, vol. 16, p. 475, and the case there cited of *D'Aguilar v. D'Aguilar* (1794), 1 Hagg. Eccl. 773, 775; *Kelly v. Kelly* (1870), L.R. 2 P. & D. 59; *Otway v. Otway* (1812), 2 Phillim. 95. The defendant was a victim to satyriasis, and his conduct to his wife was on this account such as to endanger her health, and to be equivalent to cruelty in a legal sense. By virtue of the cross-appeal, the whole case is open: see *Re Ontario Sugar Co., McKinnon's Case* (1911), 24 O.L.R. 332, 337. Reference was also made to *Russell v. Russell*, [1897] A.C. 395, at pp. 401, 402, where *Holmes v. Holmes* (1755), 2 Lee 116, is cited; also *Evans v. Evans* (1790), 1 Hagg. Con. 35; *Greenwood v. Greenwood* (1862), 32 L.J.P.M. & A. 136; *Moore v. Moore* (1864), 11 L.T.R. 459; *Hulton v. Hulton*, [1916] P. 57; Holmested's Judicature Act, 4th ed., p. 902; *Nicholson v. Nicholson* (1862), 31 L.J.P.M. & A. 165; *Cromarty v. Cromarty* (1917), 38 O.L.R. 481, 33 D.L.R. 151; *S.C.*, in appeal, *sub nom. C. v. C.* (1917), 39 O.L.R. 571. The fact that counsel had omitted to ask at the trial for a reference to fix alimony should not preclude him from obtaining the reference now.

Gideon Grant, for the defendant, referred to *Northern Electric and Manufacturing Co. v. Cordova Mines Limited* (1914), 31 O.L.R. 221, at p. 243, as to the date from which alimony should be paid. The *Russell* case, *supra*, shews that making an unfounded charge of adultery does not amount to legal cruelty: see the judgment of Lord Herschell for a statement of this case and review of the authorities. Counsel relied also on the *Ferris* case, *supra*, which was decided long before the *Russell* case. [MAGEE, J.A., referred to *Lovell v. Lovell* (1906), 13 O.L.R. 569.] Counsel referred to *Gale v. Gale* (1852), 2 Rob. Eccl. 421, in which a charge of incest was held to be not *per se* sufficient to constitute legal cruelty. *Shenango Steamship Co. v. Soo Dredging and Construction Co.* (1915), 8 O.W.N. 530, 9 O.W.N. 207, was also cited.

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Lennox, in reply, referred to the *Ferris* case as being in the defendant's favour.

March 14. MIDDLETON, J.:—Appeal and cross-appeal from the judgment of the Chief Justice of the Common Pleas, pronounced at the trial on the 12th November, 1918. The action is for alimony.

By the judgment the plaintiff is awarded alimony at the rate of \$15 per month from the date of the trial. The plaintiff appeals upon the ground that the allowance is inadequate, and that the alimony should be directed to run from the date of the writ. The defendant's appeal is upon the ground that, upon the facts disclosed, the plaintiff is not entitled to succeed at all.

The defendant by his defence charged the plaintiff with adultery. The learned trial Judge has found that this has not been proved. At the same time he finds that the making of this unfounded charge against the plaintiff in the action is the sole ground entitling her to alimony:—

“If the defendant had not taken the position which he has taken in this action, I should have considered the case one in which separate maintenance would not be allowed to the plaintiff by this Court. I should have deemed it a case in which it was the duty of the woman to return and live with her husband, he undertaking, and living up to that undertaking, to treat her in all things as a husband should treat his wife. But for what has taken place in this action, I could see no reason why these parties might not live out the little span of their lives that is left in comfort and very much better than either can separate and apart from the other. That is assuming the woman to be a decent woman. But I cannot think that any Court should require a woman to return and live with a husband who has in open Court and in the most public manner possible to him charged her not only with infidelity to him but with being nothing better than a strumpet. If what he says is true, she has no claim against him; and, if it is not true, he has no right to compel her to live with him again, although he may be willing to take her back and to live with a woman that he has spoken of under oath in the manner in which he has spoken of the plaintiff.”

The contentions advanced on the part of the defendant are two: first, that upon the evidence adultery was abundantly proved; second, that the making of an unsuccessful attempt to establish adultery, as an answer to a claim for alimony, is not in itself a ground for granting alimony; at any rate unless it is shewn that the plaintiff's health is thereby jeopardised.

Dealing first with this second contention—*Russell v. Russell*, [1897] A.C. 395, constitutes a landmark. It was there held that a false charge of having committed an unnatural criminal offence, made and persisted in without belief in its truth and published to the world, was not in itself sufficient cruelty to justify a decree for judicial separation.

The legal situation is admirably summarised by the learned Judge whose opinion is now under review, in the case of *Lovell v. Lovell*, 13 O.L.R. 569, at p. 579: "The plaintiff has no good ground of action unless her husband has been guilty of what the law considers 'cruelty' towards her. And, according to the source from which all inspiration upon the question of cruelty is almost invariably derived, 'the causes must be grave and weighty and such as to shew an absolute impossibility that the duties of the married life can be discharged;' and, 'in the older cases of this sort which I have had an opportunity of looking into I have observed that the danger to life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation; this doctrine has been repeatedly applied by the Court in the cases that have been cited; the Court has never been driven off this ground, and I have heard no one case cited in which the Court has granted a divorce without proof of reasonable apprehension of bodily hurt.' Attempts to drive the Court off that ground have been made, the last in the *Russell* case, which has authoritatively and firmly settled the law that the question, what is cruelty, is not answered by an answer to the question, has the conduct complained of been such as to make continued cohabitation impossible, but is answered by an answer to the question, has the conduct complained of been such as to cause danger, or reasonable apprehension of danger, to life, limb, or health; and which therefore includes impossibility of cohabitation. Can it reasonably be said that there was any real danger to life or health in this case?"

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Although this is found in a dissenting judgment, the statement of the law does not differ from that of the majority of the Court. The majority adopt the view that relief will be granted to a wife in the absence of personal violence where the conduct is of such a kind as to undermine health. "The present case . . . resolves itself into a question on the facts whether the plaintiff has shewn that the defendant has subjected her to treatment likely to produce, and which did produce, physical illness and mental distress of a nature calculated to permanently affect her bodily health and endanger her reason, and that there is a reasonable apprehension that the same state of things would continue:" *per Moss, C.J.O.*, at p. 571.

In the view of the majority, this question in that case was resolved in the affirmative. In the view of the minority, the wife's neurotic condition was not shewn to be real or permanent or a serious menace to her health and happiness.

This case has gone farther in favour of the wife than any other case since *Russell v. Russell*, but it falls far short of establishing the proposition that pleading adultery is an answer to an action for alimony, and attempting unsuccessfully to support this plea by evidence, in itself constitutes a ground for alimony.

In the present case no endeavour whatever was made to shew that the defendant's conduct in this respect in any way affected the plaintiff's health. There was an unsuccessful endeavour to establish by the evidence of the woman herself, uncorroborated by any medical testimony, that other conduct had interfered with her well-being.

The plaintiff was 58 years old when she married the defendant in 1916. He was then 66. The defendant advertised for a wife, and the plaintiff applied for the position.

Although she knew that the defendant was suspicious of one Alderson, a former friend of hers, she had Alderson stay all night with her alone in the house. She falsely stated and swore to the statement that her son by her former marriage was with her in the house on this occasion. A letter is produced written by her some time previously to another man devoid of delicacy and most suggestive in its terms. This letter she at first denied and then admitted and explained.

Manifestly the plaintiff is not a woman whose health is at all likely to be affected by the proceedings in this action. She has not said so, nor do I understand the learned trial Judge so to find.

In this view of the case the action fails and should be dismissed. It is, for this reason, unnecessary to deal with the other questions raised, and I do not desire to be taken as in any way concurring with the finding of fact that the adultery has not been adequately proved by the admissions of the plaintiff and her witness Alderson, quite apart from the defendant's testimony.

MAGEE, J.A.:—I agree.

HODGINS, J.A.:—I agree. I express no opinion as to whether adultery was proved.

FERGUSON, J.A.:—It is, I think, well established by authority that a false charge of having committed adultery made by a husband against a wife is not without more sufficient to support a claim that the husband has been guilty of *legal* cruelty: *Lovell v. Lovell*, 13 O.L.R. 569; *Russell v. Russell*, [1897] A.C. 395. Had it been shewn that such a charge had had the effect of impairing the health of the plaintiff, or was likely to endanger her health, we might, on the authority of *Jeapes v. Jeapes* (1903), 89 L.T.R. 74, find *legal* cruelty, but the circumstances of this case do not permit of any such finding—the plaintiff has failed to make out the other charges, and it is not necessary to deal with the truth or falsity of the charge of adultery. I would allow the appeal.

Defendant's appeal allowed.

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[APPELLATE DIVISION.]

March 14.

REX v. HOFFMAN.

Criminal Law—Forgery—Endorsement of Name of Payee on Cheque without Authority—Magistrate's Conviction—Evidence—Intention to Defraud—Absence of Honest Belief of Authority to Endorse—Statutory Crime—Criminal Code, sec. 466—Form of Case Stated under sec. 1014 of Code—Question of Law.

A cheque for a sum of money was made payable to the joint order of the defendant, a solicitor, and of a firm of solicitors. He wrote his own name and the name of the firm, in dissimilar handwriting, on the back of the cheque, and deposited it in his own bank; the cheque was paid in due course, and the defendant was credited with the whole sum, a small part of which only was his own. He had no authority to sign the name of the firm. He retained the money from April to September, and made a false statement to a member of the firm who asked him whether the money had been paid. He did not shew that the proceeds of the cheque were kept intact during the period from April until September. Upon a trial by a magistrate, the defendant was convicted of forgery:—

Held, upon a case stated by the magistrate, that there was evidence to justify the finding of an intention to defraud and of the absence of an honest belief on the part of the defendant that he had authority to endorse the cheque; and that the statutory crime of forgery—Criminal Code, sec. 466—had been committed.

Form of a case stating a question of law for the opinion of the Court under sec. 1014 of the Code.

THE following statement of the facts is taken from the judgment of MIDDLETON, J.:—

Case reserved by one of the Police Magistrates for the City of Toronto, under the provisions of sec. 1014 of the Criminal Code.

The accused was tried before the Police Magistrate for and convicted of the offence of forgery.

A cheque was drawn on the Standard Bank of Canada for the sum of \$300, payable to Messrs. Holmes & Mogan (solicitors) and James H. Hoffman (a solicitor), the accused, by Messrs. Mercer Bradford & Campbell (also solicitors). This cheque was in settlement of a claim by one Harris, a client of the firm of Holmes & Mogan, against a client of Messrs. Mercer Bradford & Campbell; Hoffman having conducted the litigation as agent for the firm of Holmes & Mogan, upon an agreement which entitled him to one-half of all fees earned. Of the \$300, \$241 was payable to Harris, and the remaining \$59 would be divisible between Holmes & Mogan and Hoffman.

Upon receipt of this cheque, Hoffman, without any authority, endorsed the name "Holmes & Mogan" upon the cheque, also his own name, the handwriting of the signature "Holmes & Mogan"

being entirely dissimilar to his own writing. He then deposited the cheque in his own bank, and in due course it was paid and the money carried to his credit.

Although Hoffman received the proceeds of this cheque in April, he did not advise either Harris or the firm of Holmes & Mogan of that fact; but, on the contrary, on the 14th September he told Mr. Holmes, according to his depositions, that the case would be settled shortly, as Mr. Bradford was busy. The untruth of this statement being discovered, information was laid on the 16th September, on which day Hoffman sent his cheque to Harris for \$241 and a cheque to Holmes for \$29.50.

The magistrate in his stated case says that he was "of the opinion that the signing of the names 'Holmes & Mogan' on the back of the said cheque by the said James H. Hoffman, and the retaining of the proceeds of the same from the 28th day of April to the 14th and 16th of September, 1918, constituted the crime of forgery."

The question submitted is: "Was I right in finding, upon the facts disclosed, on the evidence adduced, that the said James H. Hoffman was guilty of the crime of forgery?"

February 24. The case was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., MIDDLETON, J., and FERGUSON, J.A.

W. A. Henderson, for the defendant, argued that, under sec. 466 of the Code, an intent to defraud must be shewn. The evidence in this case discloses no such intention, and shews that no *mens rea* existed in the defendant. It is not a question of theft here, but of forgery: *Halsbury's Laws of England*, vol. 9, p. 713, para. 1406; *Regina v. Parish* (1837), 8 C. & P. 94. The head-note in the *Parish* case shews that, even though a person has no authority to write the name of another on an acceptance, he is not guilty of forgery in so doing, provided that, by the facts proved, it is made out that he had fair ground for supposing himself to be so authorised, and had no intention to defraud any one. It is submitted that the facts of this case bring it within the case cited, which followed *Rex v. Forbes* (1835), 7 C. & P. 224. He also referred to *Regina v. Allday* (1837), 8 C. & P. 136, 137, 138; *Regina v. Dunlop* (1857), 15 U.C.R. 118; *Regina v. Powner* (1872), 12 Cox C.C. 235; *Regina v. Hartshorn* (1853), 6 Cox C.C. 395.

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Edward Bayly, K.C., for the Crown, argued that the alleged absence of *mens rea* on the part of the defendant was beside the question. The definition of the crime of forgery given in sec. 466 of the Code shews that there was ample evidence before the magistrate to justify his finding. The whole circumstances shew that this is not what can be called a meritorious case.

March 14. The judgment of the Court was read by MIDDLETON, J. (after stating the facts as above):—The impropriety of the form of question submitted has recently been pointed out. Counsel here agreed that the case should be treated as if the question submitted was in this form: "Was there evidence on which I could find the said James H. Hoffman guilty of the crime of forgery?"

The provisions of the Criminal Code authorising the submission of a stated case do not sanction a general appeal from the decision, but merely the submission of a question of law. The question as framed by the learned magistrate would throw upon this Court the onus of determining the case upon its merits.

While the question in the form assented to by counsel is undoubtedly proper, because the question whether there is any evidence warranting the conviction is a question of law, it is not the proper form to be used if the magistrate intends to find any of the questions of fact in favour of the accused. It presupposes an adverse determination of all questions of fact in issue, as well as an adverse determination of the question of law. Where the magistrate finds in favour of the accused upon any question of fact, that finding should appear upon the face of the case stated.

Before us it was contended that an intention to defraud is an essential ingredient of the crime of forgery; and, secondly, that a *bonâ fide* belief in the existence of authority to sign the name would constitute a defence.

Upon the facts before the magistrate, the evidence appeared abundantly to justify a finding that there was an intention to defraud. The feigned handwriting of the signature, the retention of the money from April until September, the false statement that the action had not been settled, are all most significant facts. The failure to produce the bank-book to shew that the funds were kept intact during this period is also not without significance.

If the existence of an honest belief of authority to endorse constitutes a defence, then, although Hoffman in his depositions stated, "I believed I had authority to endorse this cheque," he gives no reason whatever for his belief, and the finding of the magistrate indicates his disbelief of the statement.

There is nothing in the case submitted to indicate that the magistrate in any way dissented from the view of the law presented by the defendant and his counsel.

Quite apart from this, under sec. 466 of the Criminal Code the statutory crime was abundantly proved. Forgery, it is said " . . . is the making of a false document, knowing it to be false, with the intention that it shall in any way be used or acted upon as genuine, to the prejudice of any one . . . or that some person should be induced by the belief that it is genuine, to do or refrain from doing anything"

Manifestly the false signature of Holmes & Mogan was placed upon this cheque with the intention that it should be acted upon by the bank upon which the cheque was drawn in the belief that it was the genuine signature of the firm in question.

The question submitted, as amended, should be answered in the affirmative.

Conviction affirmed.

[APPELLATE DIVISION.]

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May 26.

Ontario Temperance Act—Magistrate's Conviction for Second Offence—Evidence of Previous Conviction Received before Adjudication as to Second Offence—Provisions of sec. 96 as to Procedure—Imperative or Directory.

The provisions of sec. 96 of the Ontario Temperance Act, 6 Geo. V. ch. 50, prescribing the procedure to be followed by the magistrate upon the trial of a person accused of an offence against the Act, where a previous conviction is charged, are directory only; and a conviction will not be quashed merely because the magistrate received evidence of the previous conviction before finding the accused guilty of the subsequent offence.

Rex v. Coote (1910), 22 O.L.R. 269, explained and followed.
Order of CLUTE, J., in Chambers, reversed.

MOTION to quash a magistrate's conviction of the defendant for an offence against the Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 41 (1).

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March 14. The motion was heard by CLUTE, J., in Chambers.
J. M. Bullen, for the defendant.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

March 15. CLUTE, J.:—Motion to quash a conviction of the prisoner, made by Arthur Miers, Esq., Police Magistrate for the City of Windsor, dated the 20th February, 1919, on a charge "that the accused did unlawfully have in his possession liquor in a public place, to wit, the Royal Hotel, unlicensed, contrary to the provisions of the Ontario Temperance Act," and "that he had been previously convicted under the Ontario Temperance Act," upon the grounds: (1) that there was no evidence to justify a conviction; (2) "that evidence of a previous conviction was admitted, and ought not to have been admitted, previous to the finding of guilt, and that such admission tended to prejudice the fair trial of the prisoner."

A careful reading of the evidence shews that there was some evidence upon which a conviction could be sustained, and I so find.

As to the second objection, it presents more difficulty.

Section 96 of the Ontario Temperance Act provides:—

"The proceedings upon any information for an offence against any of the provisions of this Act in a case where a previous conviction or convictions are charged, shall be as follows:—

(a) The magistrate . . . shall in the first instance inquire concerning such subsequent offence only, and if the accused be found guilty thereof he shall then be asked whether he was so previously convicted as alleged in the information, and, if he answers that he was so previously convicted, he shall be sentenced accordingly; but, if he denies that he was so previously convicted, or does not answer such question, the judge, magistrate, or justice shall then inquire concerning such previous conviction or convictions."

On cross-examination, the accused, Frederick Mercier, was asked as follows:—

"Q. I understand that you told my learned friend that you took over this place in October? A. Yes.

"Q. How long after you had been there were you convicted of a breach of the Ontario Temperance Act? A. About 6 weeks.

"Q. Convicted of having liquor on the premises? A. Yes."

It is submitted that the effect of these questions and answers is contrary to the Act as above quoted, and the question is whether the Act is imperative or directory.

Mr. Cartwright relies on *Rex v. Coote* (1910), 22 O.L.R. 269, to shew that the statute is directory. In that case it was held that the magistrate had jurisdiction to convict the defendant in his absence. Meredith, J.A., was of the view that, since the amendment striking out the words "and not before," the provision of sec. 101 of the Ontario Liquor License Act, R.S.O. 1897, ch. 145, as to asking the defendant whether he was previously convicted, must be regarded as directory only. "*Per* Magee, J.A., that the provision is peremptory; but (with some doubt) the section may be construed, in connection with other sections, so as to authorise proceedings in the defendant's absence, if he chooses to absent himself altogether" (head-note). Maclaren, J.A., pointed out (p. 274) that sec. 101 (corresponding to sec. 96) provides only for the case where the accused is present.

In *Rex v. Hanley* (1917), 41 O.L.R. 177, where it was contended that there had been a contravention of sec. 96, Middleton, J., was of opinion that it had not been established that the magistrate received evidence of the earlier conviction previous to determining the guilt of the accused, and held that the stenographer's notes were not conclusive, and, "the conviction here being in due form, there is nothing in any way to shew a transgression of sec. 96. Even if the magistrate had erred in the manner indicated, it is now determined that this would not invalidate the conviction, the provision being merely directory: *Rex v. McDevitt* (1917), 39 O.L.R. 138;" and the *Coote* case, *supra*.

In the *McDevitt* case Middleton, J., said: "The inclination of my mind is to conclude that the Legislature meant its instruction to be obeyed, and did not regard its enactment as 'directory merely'," and that he had given effect to this view in *Rex v. Coote*, and that Mr. Justice Magee agreed with him, but that a majority of the Court had taken the view that the provision "must now be deemed to be but directory," and so he felt constrained to decide "that this provision is one which magistrates may with impunity ignore as they see fit."

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The real point decided in the *Coote* case was as to the fact, as disclosed there, that the Court was entitled to proceed in the absence of the accused, and the view expressed by Maclaren, J.A., shewed, I think, that the expression of opinion with regard to sec. 101 was *obiter*.

In my view, the receiving of the evidence of the previous conviction during the course of the trial, and before judgment on the charge then pending, was in direct contravention of the statute, and rendered the subsequent conviction illegal. Aside from the statute altogether, it being a criminal case, or quasi-criminal case, the evidence shewing a previous conviction, the recital of which tended to prejudice the mind of the magistrate, ought not to have been received: *Rex v. Melvin* (1916), 38 O.L.R. 231, 34 D.L.R. 382; and, when the statute clearly states that "the magistrate . . . shall in the first instance inquire concerning such subsequent offence *only*, and if the accused be found guilty thereof he shall then be asked," etc., it is imperative, and where this direction as to the conduct of the trial is disregarded the conviction cannot stand.

The conviction should be quashed, but without costs; the magistrate and officers should be protected; and the property taken should be returned.

The Attorney-General appealed from the order of CLUTE, J.

May 26. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. R. Cartwright, K.C., for the appellant, argued that the learned Judge below had erred in holding that the decision in *Rex v. Coote*, 22 O.L.R. 269, was *obiter*, so far as its application to the present case was concerned. The *Coote* case completely covered this case, and this Court was bound by it. [He was stopped by the Court.]

J. M. Bullen, for the defendant, respondent, contended that the language used by the Legislature in sec. 96 of the Ontario Temperance Act, was the strongest which they could use, and was peremptory and not directory. It was a carrying out of the principle of English law that the prisoner should have a fair trial, and that the magistrate's mind should not be biased by the admission of evidence of a previous conviction. Such bias was particularly to be avoided because the punishment on conviction for a

second offence was imprisonment. The deletion of the words "and not before" from the section of the statute which was construed in the *Coote* case did not make the section any less positive. "Shall" was always peremptory. Counsel submitted that what was said in the *Coote* case was *obiter* so far as this case was concerned. The real question in the *Coote* case was whether a man could be tried for a second offence in his absence. The language of the *Coote* case would have been modified in regard to the point now before the Court if the section had been as it is at present: *Regina v. Edgar* (1887), 15 O.R. 142; *Rex v. Nurse* (1904), 7 O.L.R. 418; *Rex v. Teasdale* (1910), 20 O.L.R. 382; *Rex v. Dealtry* (1903), 40 Can. L.J. 38.

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At the conclusion of the hearing, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—We are all clearly of opinion that the case of *Rex v. Coote*, 22 O.L.R. 269, governs this case; and that case is one which was binding on the Judge at Chambers and is binding on us, the conviction being for an offence against the provisions of an Ontario statute; therefore this appeal must be allowed and the motion in the Court below dismissed.

It is not needful that more should be said, but it may be proper to point out that in *Rex v. Coote* the then Chief Justice of Ontario pointedly called the attention of the Legislature to the conclusions of the Court in it, and in effect asked for legislation correcting the interpretation which the Court had put upon the words in question if it were not in accord with the intention of the Legislature: and that no fault has been since found, expressed in legislation, with the decision which we follow.

*Appeal allowed without costs and motion
dismissed with costs.*

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[IN CHAMBERS.]

March 15.

REX V. BAIRD.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41 (1) —“Private Dwelling House”—Suite of Rooms in Apartment-house in City—Defendant Living alone—“Family”—Sec. 2 (i) (ii).

The defendant had intoxicating liquor in his “flat” or suite of rooms in an apartment-house in a city. He was unmarried; he slept in the apartment, and took his meals (except breakfast) in it; he was the only person who slept there, but a servant came in during the day, cared for the premises, and prepared the defendant's meals on the premises:—

Held, that the defendant's apartment was a “private dwelling house” within the definition of that term in sec. 2 (i) of the Ontario Temperance Act, 6 Geo. V. ch. 50, which, by clause (ii), includes a suite of rooms in which “there are facilities for cooking, and a family actually residing, cooking, sleeping and taking their meals.”

And a magistrate's conviction of the defendant for having intoxicating liquor in a place other than the private dwelling house in which he resided, contrary to sec. 41 (1) of the Act, was quashed.

MOTION to quash a conviction of the defendant, by the Police Magistrate for the City of Hamilton, for having intoxicating liquor in his (the defendant's) possession, in contravention of the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50.

Section 41 (1) of the Act provides that no person shall have liquor in any place other than in the private dwelling house in which he resides. The definition of “private dwelling house” is found in sec. 2 (i) of the Act; and by clause (ii) “private dwelling-house” shall include a suite of rooms in an apartment block, in a city, “in which suite there are facilities for cooking, and a family actually residing, cooking, sleeping and taking their meals.”

March 14. The motion was heard by CLUTE, J., in Chambers.
M. J. O'Reilly, K.C., for the defendant.
J. R. Cartwright, K.C., for the Attorney-General for Ontario.

March 15. CLUTE, J.:—This is a motion to quash a conviction by George Frederick Jelfs, Esq., Police Magistrate for the City of Hamilton, “for that the said Arthur Baird did unlawfully have liquor in his possession in the Commercial Apartments, 41 Park street north, in the city of Hamilton, in contravention of the Temperance Act.”

The question turns upon whether or not the accused, occupying the premises, can properly be regarded as “a family actually

residing, cooking, sleeping and taking their meals" on the premises in question.

The facts of the case are not in dispute. The accused is unmarried, and occupies the apartment at 41 Park street. It is not disputed that the apartment falls within the description of a private dwelling within the meaning of the statute; but it is contended that the facts do not bring it within sec. 2 (i) (ii) of the Act. The clause provides: "Notwithstanding the above restrictions 'private dwelling house' shall include . . . a suite of rooms . . . in which suite there are facilities for cooking, and a family actually residing, cooking, sleeping and taking their meals."

The accused is a clerk in a hotel. He occupies the premises in question, where he takes his dinner and supper. It is said that some few weeks back he had a regular servant who lived in the premises and got his meals. He has now a servant who comes in, looks after the premises, and gets the accused's dinner and supper.

The magistrate has, in effect, found that the accused and his servant do not constitute "a family actually residing, cooking, sleeping and taking their meals." No authority was cited directly in point. A considerable quantity of liquor was found upon the premises. There are in the suite facilities for cooking, and cooking is done upon the premises where the accused sleeps, and takes his meals, except breakfast. Giving them their natural meaning, the words "a family actually residing, cooking, sleeping and taking their meals," seem to imply that more than one person is intended. Suppose a man and his wife occupy premises of this kind and take their meals there. There should be no question that this would fall within the statute as constituting "a family." If then the wife died, and the husband remained, a woman coming in, cooking his meals, and taking care of the house, but not sleeping there, I think it could scarcely be doubted that that would still constitute a family within the meaning of the Act.

It is urged here that because of the accused's business and association with a hotel, and because a considerable quantity of liquor was found on the premises, and because the accused is the only person who sleeps there, the facts do not bring the case within the description of "a family" within the meaning of the Act.

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With some hesitation, I am of opinion that it does come within the Act—that the premises constitute “a private dwelling house” within the Act.

The conviction should be quashed, but without costs; the magistrate and officers should be protected; and the property removed, if any, should be returned.

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[IN CHAMBERS.]

March 15.

RE NEW YORK LIFE INSURANCE CO. AND FULLERTON.

Insurance (Life)—Policy-moneys Payable to Executors or Administrators or Assigns or to Designated Beneficiary—Contest over Moneys after Death of Assured—Claim by Execution Creditors of Assured—Designation of Sister as Beneficiary at Time when Execution Unsatisfied in Sheriff's Hands—Effect of Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, secs. 2, 3—Execution Act, R.S.O. 1914, ch. 80, sec. 20—“Security”—“Security for Money”—Equitable Execution—“Personal Property”—“Conveyance”—Fraudulent Payment of Premiums—Insurance Act, R.S.O. 1914, ch. 183, sec. 171—Construction of sub-sec. (2).

By a policy issued in 1905 the insurance company, in consideration of the making of 20 annual payments, contracted to pay, upon the death of the assured, \$2,000 to his executors, administrators, or assigns, or to such beneficiary as might be designated by the assured. In 1915, creditors of the assured recovered judgment against him for a large sum of money, and in January, 1916, placed an execution in the hands of the sheriff, who, at a later date, made a return of *nulla bona*. By an endorsement on the policy, dated the 30th October, 1916, the sister of the assured was by him designated beneficiary. He died in September, 1917. The policy-moneys were claimed by the sister and also by the execution creditors. No consideration was given by the sister to the assured; the designation of her as beneficiary was the voluntary act of the assured:—

Held, even assuming that the assured was, at the time of the endorsement, insolvent, that the contention of the creditors that the designation of the sister was fraudulent and void as against creditors, because of the statute 13 Eliz. ch. 5, or the Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, sec. 3, could not be sustained.

The policy was not a “security for money” within the meaning of the Execution Act, R.S.O. 1914, ch. 80, sec. 20, nor a “security” within the meaning of the Fraudulent Conveyances Act, secs. 2 (b) and 3; the interest of the assured in the policy was not exigible under the writ of execution, and could not have been reached by the process of equitable execution, in his lifetime; and, therefore, was not “personal property” to which the Fraudulent Conveyances Act applied; nor, if it was personal property, did the assured make a “conveyance” of it or of his interest in it.

Review of the authorities.

Re Asselin and Cleghorn (1903), 6 O.L.R. 170, specially referred to.

Semble, as there was no attempt to shew any fraudulent payment of premiums by the assured, and the amount paid after the recovery of the judgment was trifling, sec. 171 of the Insurance Act, R.S.O. 1914, ch. 183, was an answer to the creditors' claim.

The true meaning of sub-sec. (2) of that section, as it now stands, is that, whatever may be the right of a judgment creditor to reach, in the lifetime of the debtor, a policy effected by the debtor on his own life, the right

which he has, after the decease of the debtor, is not a right to the whole of the policy-moneys as a fund created by moneys paid by the debtor in fraud of his creditors, but only a right to receive out of such moneys an amount not exceeding any premiums shewn to have been so fraudulently paid, with interest thereon.

MOTION by Elizabeth Fullerton for payment out to her of certain moneys in Court; and cross-motion by W. L. McKinnon & Co. for payment out to the sheriff.

February 22, 1918. The motions were heard by ROSE, J., in Chambers.

J. E. Lawson, for Elizabeth Fullerton.

J. B. Clarke, K.C., for W. L. McKinnon & Co.

March 15, 1919. ROSE, J.:—This was a motion by Elizabeth Fullerton, the beneficiary designated by an endorsement upon a policy of life insurance, for payment out of Court to her of the policy-moneys, which were paid into Court by the insurer when a dispute as to the person entitled to receive them arose; and a cross-motion by W. L. McKinnon & Co., execution creditors of the deceased, for payment out to the sheriff. The motion was argued a long time ago, but the consideration of it was postponed, pending the preparation of a memorandum of authorities which counsel for the creditors was given leave to hand in.

The policy in question was issued by the New York Life Insurance Company to J. J. Doran on the 21st October, 1905. By it the insurer, in consideration of the payment of 20 annual premiums, contracted to pay, upon the death of the assured, \$2,000 to the executors, administrators, or assigns of the assured, or to such beneficiary as might be designated by written notice to the company and by endorsement on the policy.

There is no evidence as to where or how the policy was delivered by the company to the assured; but the case was argued upon the assumption that the delivery was in Ontario and that the provisions of the Ontario Insurance Act, R.S.O. 1914, ch. 183, are applicable to it: see sec. 155.

In September, 1915, McKinnon & Co. recovered judgment against the assured for a large amount of money, and in January, 1916, they placed an execution in the hands of the sheriff, who, at a later date, made a return of *nulla bona*. The judgment was

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affirmed by the Supreme Court of Canada in June, 1916 (*Doran v. McKinnon*, 53 Can. S.C.R. 609, 31 D.L.R. 307).

By an endorsement on the policy, dated the 30th October, 1916, Mrs. Fullerton, the sister of the assured, was designated beneficiary. The assured died on the 10th September, 1917.

There is no suggestion that consideration was given by Mrs. Fullerton to the assured, or that the designation of her as beneficiary was anything other than the purely voluntary act of the assured; it is, however, argued that it is not established that the assured, at the time when he caused the endorsement to be made, was unable to pay his debts in full. In the view which I take of the case, it is not necessary to decide the question of solvency or insolvency, for, even assuming insolvency, I think that the claim of the creditors that the designation of Mrs. Fullerton as beneficiary was fraudulent and void as against creditors, because of the statute 13 Eliz. ch. 5, R.S.O. 1914, ch. 105 (the Fraudulent Conveyances Act*), sec. 3, cannot be sustained.

The question whether an *assignment* of a policy of insurance upon the assignor's life comes within the statute has been considered in several cases; but apparently this is the first case in which it has been sought to apply the statute to a revocable designation of a person as the beneficiary to receive the money which is to become payable on the death of the assured.

There can be no doubt that for very many years after the passing of the statute 13 Eliz. ch. 5, the Courts would have held that a policy of life insurance was not property of the kind affected by the Act, "goods and chattels;" but, as stated by Kekewich, J., in *Ideal Bedding Co. Limited v. Holland*, [1907] 2 Ch. 157, 166,

* Sections 2 and 3 of this Act are as follows:—

2. In this Act,

(a) "Conveyance" shall include gift, grant, alienation, bargain, charge, incumbrance, limitation of use or uses of, in, to or out of real property or personal property by writing or otherwise.

(b) "Personal property" shall include goods, chattels, effects, bills, bonds, notes and securities, and shares, dividends, premiums and bonuses in any bank, company or corporation, and any interest therein.

(c) "Real property" shall include lands, tenements, hereditaments, and any estate or interest therein.

3. Every conveyance of real property or personal property and every bond, suit, judgment and execution at any time had or made or at any time hereafter to be had or made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures shall be null and void as against such persons and their assigns.

"probably the operation of no statute has been affected so much by subsequent legislation as that of 13 Eliz. ch. 5. Property which was not originally within the reach of creditors has from time to time been brought within their reach, and whenever that has been done the Courts have been prompt to recognise that such property can be disposed of fraudulently as against creditors, that is, so as to delay, hinder, or defraud them in pursuing newly conferred rights of proceeding."

One statute which brought new classes of property within the reach of creditors is the Judgments Act, 1 & 2 Vict. ch. 110 (Imp.) Section 12 of that Act, by words which are, with slight changes, continued in the Execution Act, R.S.O. 1914, ch. 80, sec. 20, directs the sheriff having the execution of a writ of *fiery facias* to seize, *inter alia*, any bonds, specialties or other securities for money, belonging to the person against whose effects such writ has been sued out; and it directs the sheriff to hold such bonds, specialties or other securities for money as a security for the amount by such writ of *fiery facias* directed to be levied; and authorises him to sue for the sum or sums secured thereby, if and when the time of payment thereof shall have arrived.

Upon the principle stated by Kekewich, J., in the passage above quoted, it has been held in some cases that policies of life insurance are, as "securities for money," made available in execution by 1 & 2 Vict. ch. 110, and so are to be treated as "goods" within the meaning of 13 Eliz. ch. 5; and, therefore, that assignments of them made with intent to delay, hinder, or defraud creditors are void as against the creditors hindered, delayed, or defrauded.

In Ontario, nowadays, when the question relates to a "security," it is not necessary to combine the two statutes; for the Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, sec. 2 (b), defines the personal property to which sec. 3 (the Ontario version of 13 Eliz. ch. 5) relates, as including "bills, bonds, notes and securities," so that we have, in the one statute, an enactment that every conveyance, i.e., *inter alia*, every gift, grant or alienation (sec. 2 (a)) of bills, bonds, notes or securities (sec. 2 (b)), made with the specified intent, shall (sec. 3) be void as against the creditors defeated, hindered, delayed, or defrauded. It is, however, necessary, in the reading of the cases, to keep in mind the process by

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which the operation of 13 Eliz. ch. 5 has been judicially extended to property not originally within its purview.

The first of the cases in which a policy of insurance upon the life of the assignor was held to be "goods" covered by 13 Eliz. ch. 5, is, I think, *Stokoe v. Cowan* (1861), 29 Beav. 637. By the policies there in question the sum assured was to be paid "out of the funds of the society" insuring; and the document attacked was an indenture by which the assured assigned not only the policies but also his claim "upon the capital, stock and funds of the said assurance company in respect thereof." As I understand the judgment of the Master of the Rolls, Sir J. Romilly, and the cases upon which that judgment was based, the reason for holding that the policies were securities for money was that they created an equitable charge upon the property of the insuring company.

The next case is *Freeman v. Pope* (1870), L.R. 5 Ch. 538. There is nothing in the report to shew the kind of policy that was in question, except that it was a policy which had been in existence for 18 years and that it was not paid-up; nor is there anything to shew why the policy was held to be property to which the provisions of 13 Eliz. ch. 5 were applicable: Lord Hatherley, L.C., and Giffard, L.J., confine themselves in their judgments to the question whether the assignor was insolvent and whether there was the intent to delay, hinder, or defraud creditors. It seems to have been taken for granted that the policy was property of a kind to which the statute applied.

Taylor v. Coenen (1876), 1 Ch. D. 636, was an administration suit. The testator, a trader, had insured his life—the kind of policy is not stated—and, being desirous of making a provision for his wife, he assigned the policies for her benefit, and he subsequently made another assignment of his furniture for the same object. He was insolvent at the time of making the assignments, and he died insolvent within two years after making the assignment of the policies. Malins, V.-C., held that the deeds were fraudulent and void. There is nothing in the report to indicate that there was any discussion as to whether the same considerations applied to the policies as to the furniture.

The only other English case that need be mentioned is *In re Mouat, Kingston Cotton Mills Co. v. Mouat*, [1899] 1 Ch. 831. There was in that case no actual decision that the policies were

property to which the statute applied; but counsel seemed to be content to concede the point.

Turning to the Ontario cases, we have first *Weekes v. Frawley* (1893), 23 O.R. 235. In that case the judgment creditor had obtained an order appointing a receiver by way of equitable execution to receive the interest of the defendant in a policy upon his life, it being a policy to be paid-up in 30 years, upon which payments had been made for 20 years. Afterwards the plaintiff (the judgment creditor) moved for and obtained an order authorising the receiver to surrender or sell the policy in order to realise the amount of the judgment. Against the last mentioned order an appeal was taken to the Chancery Divisional Court; but there was no appeal against the order appointing the receiver. The Court allowed the appeal, holding that the order for sale was improper. Boyd, C., was of opinion that *Stokoe v. Cowan, supra*, extended unwarrantably the provisions of the statute 13 Eliz. ch. 5; he preferred certain Irish cases in which it was held that policies of life insurance are not "securities for money" which can be seized by a sheriff; he also expressed the opinion that, because the policy could not be seized by the sheriff, the receivership order was rightly made. Robertson, J., thought that on the materials presented in support of the application for the appointment of a receiver the order was properly made, and that, as the motion to continue it was unopposed, it was rightly continued; but he thought that a certain designation of the wife of the assured as beneficiary, made pursuant to the provisions of the Act to secure to Wives and Children the benefit of Life Insurance, although made after the receiver had been appointed, was effective to put the policy out of the reach of the creditors. Meredith, J., thought that, even if there was power to make the order appealed from, it ought not to have been made in the circumstances of the particular case. The reasons given by the several members of the Court being as stated, it does not seem that the case can be treated as a decision of the Court that a policy of life insurance on which there are premiums still to be paid is not exigible in execution. Nor is it a decision that such a policy can be reached in equitable execution by the appointment of a receiver: the question as to whether the receivership order was rightly made was not raised by the appeal.

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In *In re William Roddick* (1896), 27 O.R. 537, the question was as to a policy which by its terms was payable, in the event of the death of the assured, to certain beneficiaries of the preferred class, if living, and failing them to the sisters of the assured. No persons of the preferred class survived the assured, and the sisters claimed the policy-moneys. Street, J., said that the taking out of the policy was in effect a voluntary settlement upon the sisters; but the decision was that it was not shewn that the assured was not in a position to make a voluntary settlement; and, so, that the sisters' claim was valid.

In *Crawford v. Canada Life Assurance Co.* (1897), 24 A.R. 643, it seems to have been assumed that a policy of insurance upon the life of the debtor passed to his assignee under a general assignment for the benefit of creditors; but what was decided was that, as no notice of the assignment had been given by the assignee to the insurers, the latter were discharged by a payment of the surrender value of the policy, which they had, in good faith, made to the assured.

In *Canadian Mutual Loan and Investment Co. v. Nisbet* (1900), 31 O.R. 562, the Common Pleas Division upheld an order by which a receiver was appointed to receive any bonus or dividend which might accrue in respect of a paid-up policy on the life of the judgment debtor. The judgment of the Court, which was written by the present Chief Justice of Ontario, suggests some doubt concerning the opinion expressed by the Chancellor in *Weekes v. Frawley*, *supra*, that a policy upon which there are premiums still to be paid is not exigible in execution; but the learned Chief Justice did not think it necessary to consider whether the Chancellor's conclusion was the correct one; he thought that, whatever might be said about a policy upon which there are premiums still to be paid, a paid-up policy is a security for money.

In *Re Asseslin and Cleghorn* (1903), 6 O.L.R. 170, the present Chief Justice of the Common Pleas declined to appoint a receiver to receive, by way of equitable execution, the interest of the debtor in a policy on the life of another, assigned to the debtor, on which there were premiums still to pay. He thought that it was not "just or convenient" (the Judicature Act, R.S.O. 1914, ch. 56, sec. 17) to make the order: it was not shewn that the underwriters could be compelled to accept the premiums from the

receiver: to give effect to the application might be simply to avoid the policy without conferring any benefit upon the applicant. Citing *Weekes v. Frawley*, *supra*, and *Canadian Mutual Loan and Investment Co. v. Nisbet*, *supra*, as well as the Irish cases referred to by the Chancellor in the former case, he said that the weight of argument and of judicial opinion was against the applicant; and he added (p. 173): "The policy in question cannot be considered to come within the meaning of the words 'any money or bank notes . . . and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money,' contained in sec. 18 (now sec. 20) of the Execution Act. It is not of the same nature as those mentioned, even if it can in any sense be deemed a security for money."

If the passage just quoted is taken, as it appears to me it ought to be, as expressing what was actually decided in *Re Asselin and Cleghorn*—i.e., if the *decision* in that case was not merely that, upon such evidence as was presented, it was not "just or convenient" to appoint a receiver—it is binding upon me and is decisive of the question whether the policy here in question is a "security for money," within the meaning of the Execution Act. Whether or not it is binding upon me, it expresses exactly my own opinion, and I think the analysis which I have made of the more important of the earlier decisions justifies me in saying that there is nothing in them which compels me to hold that the policy in question here is a "security for money" within the meaning of the Execution Act, or a "security" within the meaning of the Fraudulent Conveyances Act. I, therefore, hold that it is not such a "security for money" or "security." It is not under seal and cannot be called a "specialty."

What I have already said does not quite dispose of the case. The judgment in *Ideal Bedding Co. Limited v. Holland*, [1907] 2 Ch. 157, from which I have already quoted, shews that certain classes of property have been brought within the mischief of the statute 13 Eliz. ch. 5, by the extension of "the modern procedure known as equitable execution." If, then, it had been shewn that, in the lifetime of the assured, the creditors could have reached this policy by that process, the holding would have been that it was "personal property," the "conveyance" of which in fraud of creditors would be avoided by the Fraudulent Conveyances Act.

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But I do not think that that has been shewn. In *Weekes v. Frawley*, *supra*, the Chancellor and Robertson, J., did express the opinion that the appointment of a receiver in respect of the policy there in question was proper; but, as I have already pointed out, the appeal which they were considering was not an appeal from the receivership order. Moreover, it does not appear from the report what, if any, evidence there was upon the questions suggested in *Re Asselin and Cleghorn*, *supra*, as being necessary for determining whether it is just or convenient to appoint a receiver. So that *Weekes v. Frawley* cannot be treated as deciding that the policy here in question could have been taken in equitable execution in the lifetime of the assured, Doran. *Re Asselin and Cleghorn* is, however, a direct authority, binding upon me, for saying that, upon the evidence which the creditors have seen fit to present in this case, it would not have been just or equitable to appoint a receiver of the interest of the assured in the policy in question: we are quite in the dark here as to the matters which were left in doubt in that case, except only that the company's contract is, upon the death of the assured, to pay the sum assured to the executors, administrators, or assigns of the assured, or to the designated beneficiary. In addition to the doubt in which I am left as to what it would have been proper to do in this particular case if application had been made, in the lifetime of the assured, for the appointment of a receiver to receive his interest in this particular policy, I entertain very considerable doubt as to whether a receiver would in any case be appointed, by way of equitable execution, to receive the interest of a debtor in a policy on his life, upon which there are premiums still to be paid. If I am right in thinking that such a policy is not a security for money, within the meaning of the Execution Act, and if Middleton, J., is correct in his statement in *Manufacturers Lumber Co. v. Pigeon* (1910), 22 O.L.R. 36, as to what is the purpose of the appointment of a receiver by way of equitable execution, viz., to aid the creditor in reaching assets which are in their nature exigible to answer his claim, but which, for some reason, cannot be reached by the ordinary mode of execution, i.e., under a *fi. fa.* or by garnishee process, it seems to follow that the appointment would not be made in any case. The order made by Middleton, J., in the case cited was reversed on appeal by a Divisional Court of the High

Court, 22 O.L.R. 378, and the judgment of the Divisional Court was affirmed by the Court of Appeal (1911), 24 O.L.R. 354; but the judgment in the Court of Appeal does not cast any doubt upon the accuracy of the statement referred to.

For these reasons, I am of opinion that the interest of the debtor, Doran, in the policy in question is not shewn to have been something which could have been reached by the process of equitable execution in his lifetime; and I have already said that I think it was not exigible under the writ of execution; therefore I think it was not "personal property" to which the Fraudulent Conveyances Act applies, and that the claim of the execution creditors fails, even if there was any "conveyance" of it by Doran, within the meaning of that Act.

Even if the foregoing conclusion is incorrect, it still appears to me that the Fraudulent Conveyances Act does not apply; for the reason that Doran did not make any "conveyance" of the policy or of his interest in it.

As already stated, the contract evidenced by the policy is a contract to pay, upon the death of the assured, \$2,000 to the executors, administrators, or assigns of the assured, or to such beneficiary as may have been designated in the manner in the policy provided. The policy was to be paid-up in 20 years. At the end of the 20 years the assured, if living, was to have the right to exercise any one of several options, e.g., to receive the profits and continue the policy in force without further payment of premiums, or to receive the entire cash value and terminate the insurance; and, during the 20 years, the assured was given certain privileges as to obtaining loans on the security of the policy, etc.; and it was expressly provided that the assured might, "without the consent of the beneficiary, receive every benefit, exercise every right, and enjoy every privilege conferred upon" him by the policy. What the assured did was to designate Mrs. Fullerton as beneficiary, i.e., to direct the company to pay her the \$2,000 if he kept up his premiums and died without changing the beneficiary and without having put an end to the policy, e.g., by exercising the option to take, at the end of the 20 years, the entire cash value of the policy. But he continued to be the owner of the policy, capable at any time of exercising each and every power conferred upon the assured, including the power of changing the beneficiary,

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e.g., by making the policy payable to his estate, and capable of receiving every benefit which might accrue under the policy. How, then, it can be said that he "conveyed" the policy, i.e., that he made a "gift, grant, alienation," etc., of it, I do not understand; and, if he did not so convey it, he did not do anything which the Act makes null and void. Upon this ground, also, the claim of the creditors fails.

There is one other reason why I think the creditors ought to fail; and, although the view which I take of the effect of the Fraudulent Conveyances Act renders it unnecessary for me to consider it, I think that, as it was debated at length, it would be well to state my conclusion upon it. By the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 171, sub-sec. (1), it is enacted that every person of the full age of 21 years shall have an unlimited insurable interest in his own life and may effect *bonâ fide* at his own charge insurance of his own person for the sole or partial benefit of himself or of his estate or of any other person; and sub-sec. (2) provides that "if the premiums on such insurance were paid by the assured with intent to defraud his creditors they shall be entitled to receive out of the insurance money an amount *not exceeding* the premiums so paid and interest thereon."

The origin of this sub-section (2) seems to be in the Married Women's Property Act of 1870 (Imperial), 33 & 34 Vict. ch. 93, sec. 10. Its first appearance in Ontario is in the Married Women's Property Act of 1872, 35 Vict. ch. 16, sec. 4, as part of the section relating to insurance originally effected, or later declared to be, for the benefit of the wife, or wife and children, or any of them, of the assured. It later became part of the Act to secure to Wives and Children the benefit of Life Insurance: see R.S.O. 1877, ch. 129; R.S.O. 1887, ch. 136; and it continued to be part of that Act until the passing of the Ontario Insurance Act of 1897, 60 Vict. ch. 36. As it was originally worded, the rights of the creditors attached if the *policy of insurance was effected* and the premiums were paid with the fraudulent intent: but in the revision of 1912, 2 Geo. V. ch. 33, sec. 171, the words above printed in *italics* were dropped, and the section was made to read as it now appears; so that since 1912 creditors have not been concerned to prove that there was fraud in taking out the policy in the first place; what they are concerned with is a fraudulent diminution of the debtor's estate by the payment of premiums.

In the Married Women's Property Act, and in the Act to secure to Wives and Children the benefit of Life Insurance, the provision in question appears as a qualification upon the sections which declare that, so long as any object of the trust remains, the insurance shall not be subject to the control of the husband or his creditors or form part of his estate. When the Ontario Insurance Act of 1897 was passed, the provisions of the Act to secure to Wives and Children the benefit of Life Insurance were incorporated in it: 60 Vict. ch. 36, secs. 159 to 161; but this section was taken out of its former context, and was made part of a long general section, 151, its place in that section being, as in the present Revised Statute, immediately after the declaration of the right of a person to insure his own life, in any amount, for the benefit of whom he will. I ought to have noted that until 1912 the amount which the creditors were declared entitled to receive in the cases to which the section applies was an amount *equal to* the premiums fraudulently paid; but the Insurance Act of that year, 2 Geo. V. ch. 33, sec. 171 (2), changed it to an amount not exceeding such premiums, as it now stands.

Why the changes in the legislation were made, why the section was changed from a declaration of a qualification upon the right of a man to carry insurance for the benefit of his wife and children into a qualification upon his right to carry it for the benefit of any person whomsoever, and why the amount recoverable by the creditors out of the insurance money was changed from an amount equal to the premiums fraudulently paid to an amount *not exceeding* such premiums, one cannot say with certainty; but it appears to me that the true meaning of the sub-section, as it now stands, is that, whatever may be the right of a judgment creditor to reach, in the lifetime of the debtor, a policy effected by the debtor upon his own life, the right which he has, after the decease of the debtor, is not a right to the whole of the policy-moneys as a fund created by moneys paid by the debtor in fraud of his creditors, but only a right to receive out of such moneys an amount not exceeding any premiums shewn to have been so fraudulently paid, with interest thereon. There was no attempt in this case to shew any fraudulent payment of premiums, and the amount paid after the recovery of the judgment is trifling; therefore I think the section under discussion is an answer to the creditors' claim.

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There will be an order for payment of the money out of Court to Mrs. Fullerton; W. L. McKinnon & Co. will pay the costs of the motion.

[An appeal by the execution creditors from the above decision was dismissed by the Second Divisional Court on the 30th May, 1919. See 16 O.W.N. 258. The reasons for the judgment of the Court will be reported in due course.]

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[ROSE, J.]

BAKER V. CITY OF TORONTO.

SPEAL V. CITY OF TORONTO.

Municipal Corporations—Liability of City Corporation for Neglect of Police Force to Protect Property of Ratepayers from Robbery and Violence—Relation of Police Force to Corporation—Municipal Act, secs. 354-370—Pleading—Rule 124—Summary Dismissal of Actions.

The plaintiffs, residents and ratepayers of a city, sought in these actions to recover from the city corporation damages in respect of the loss sustained by them by rioters invading their business premises and stealing and injuring their goods, alleging that the police force employed and maintained by the corporation, and paid out of the rates and taxes to which the plaintiffs had contributed, should have protected their premises and prevented the riotous and unlawful conduct complained of:—

Held, that the duty of preserving the peace and of preventing robberies and other crimes and offences was a duty cast by the Municipal Act, R.S.O. 1914, ch. 192, sec. 367, upon the police force, and not upon the corporation; what was complained of was merely inaction; and, unless the act left undone was an act which the city corporation was under legal obligation to do, the failure to do it did not bring the corporation under liability, even if the person who was charged with the duty of doing it was one who, for some purposes and in respect of certain matters, could be looked upon as the servant of the corporation. It was not alleged that the corporation failed to perform any of the duties expressly cast upon it or its council by any of the provisions of the Municipal Act from sec. 354 to sec. 370; and proof of the facts alleged would not establish legal liability on the part of the corporation.

The actions were summarily dismissed upon motions made under Rule 124.

MOTIONS by the Corporation of the City of Toronto, the defendant in both actions, for orders (under Rule 124) striking out the statements of claim and dismissing the actions, upon the ground that the statements of claim disclosed no reasonable causes of action against the defendant.

March 3. The motions were heard by ROSE, J., in the Weekly Court, Toronto.

C. M. Colquhoun, for the defendant.

H. H. Dewart, K.C., for the plaintiffs.

March 17. ROSE, J.:—These are two motions heard together, made on behalf of the defendant, for orders striking out the statements of claim and dismissing the actions, upon the ground that the statements of claim disclose no reasonable cause of action against the defendant. Counsel are agreed that, in the circumstances of the cases, it is desirable that the question raised be determined upon this summary application, made under Rule 124, so that if the plaintiffs have no cause of action that fact may be speedily ascertained.

In the *Speal* case the allegations in the statement of claim are: that the plaintiffs were for more than a year preceding the occurrences hereinafter mentioned, and still are, residents and ratepayers of the city of Toronto, owning and operating a restaurant; that they duly paid the rates and taxes levied against their business; that the city corporation, under the provisions of the Consolidated Municipal Act, employed and maintained a police force charged with the duty of preserving the peace and of preventing robbery and other crimes, which force was maintained and paid out of the rates and taxes to which the plaintiffs had contributed; that on the 2nd August, 1918, the plaintiffs learned that a number of persons had been threatening violence to the plaintiffs' premises and were conspiring with the intention of destroying or damaging the said restaurant at about 6 p.m. on that day; that the plaintiffs notified the officers in charge of one of the police-stations of the threatened violence; that two policemen were sent to the plaintiffs' premises, but the city corporation and the police force negligently failed to take any other precaution or to furnish any other protection; that about 6 p.m. on the said day a large number of persons, without any provocation from the plaintiffs, unlawfully, tumultuously, and riotously assembled, and broke into the restaurant and destroyed or stole the contents thereof; that, although there were members of the police force on duty in the neighbourhood, and although the defendant and the police force could readily have prevented the damage, destruction and theft, they negligently refrained from attempting to do so; that it was the duty of the defendant and its police force to protect the plaintiffs' premises and to prevent the riotous conduct aforesaid; and that the defendant is liable for the damages sustained by the plaintiffs, some \$5,700.

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The statement of claim in the *Baker* case is similar, except that, instead of the allegation of express notice by the plaintiffs to the police that the danger was to be apprehended, there is an allegation that the defendant and the police force knew that persons had unlawfully and riotously assembled and were proceeding to break into restaurants owned or operated by persons of Greek nationality, and knew that the plaintiff was a Greek, and that the threat extended to his premises. The damages claimed in this case are over \$3,000.

It appears to me that proof of the facts alleged in these pleadings would not establish legal liability on the part of the city corporation.

The more important of the relevant provisions of the Consolidated Municipal Act, R.S.O. 1914, ch. 192, are as follows: In every city there shall be a board of commissioners of police, consisting of the Mayor, a Judge of the County Court, and the Police Magistrate (sec. 354); the city council shall appoint a high bailiff, who may be the same person as the chief constable (sec. 358); the police force shall consist of a chief constable and as many constables and other officers and assistants as the city council may deem necessary, but not less than the board reports to be absolutely required (sec. 359); the members of the police force shall be appointed by and hold office during the pleasure of the board, and shall take an oath truly, faithfully, and impartially to perform the duties appertaining to their office (sec. 360); the board may make regulations for the government of the force, and for rendering it efficient in the discharge of its duties, and the members of the force shall be subject to the government of the board and shall obey its lawful directions (secs. 361 and 362); the members of the force, the chief constable and the constables, shall be charged with the duty of preserving the peace, of preventing robberies, and other crimes and offences, including offences against the by-laws of the city, and of apprehending offenders, and laying information before the proper tribunal, and prosecuting and aiding in the prosecution of offenders (sec. 367); the city council may provide for the payment to the chief constable of such salary or remuneration as it may determine (sec. 368); and shall appropriate for and pay such remuneration to the members of the police force as the board may determine, and shall provide and pay for all such offices, arms,

accoutrements, clothing, and other things as the board may deem requisite and require for the accommodation, use and maintenance of the force (sec. 363).

There is no suggestion in the statements of claim that the defendant failed to perform any of the duties expressly cast upon it or its council by any of the sections which I have mentioned, that is to say, the duties of appointing a chief constable and of paying his salary, and of appropriating for and paying the remuneration of the members of the police force, and of providing and paying for all things required by the board for the accommodation, use, and maintenance of the force; indeed, the allegation is that the force was constituted, and that it was maintained and paid out of the rates and taxes. What is complained of is the non-performance of the duty of preserving the peace and of preventing robberies and other crimes and offences; but that is a duty which the statute casts upon the members of the force, the chief constable and the constables, and not upon the city corporation.

There have been in many cases attempts to render municipalities liable for wrongs done by constables when acting, as it was alleged, as servants of the municipality. In nearly all of such cases it has been held that the constables were not the servants of the municipality, and that the municipality was not responsible for the wrongs done by them. The position of the city in these cases is, as it appears to me, even stronger than the position of the municipalities which were defendants in those cases; for what is complained of here is merely inaction; and, unless the act left undone was an act which the city corporation was under legal obligation to do, the failure to do it does not bring the corporation under liability, even if the person who was charged with the duty of doing it was a person who, for some purposes and in respect of certain matters, could be looked upon as the servant of the corporation.

Mr. Dewart laid stress upon the allegation that the city corporation collected taxes from the plaintiffs and that the remuneration of the police force was paid out of the taxes. That allegation may be assumed to be true; but it must also be true that the collection of the money was in performance of the city corporation's statutory duty to assess and levy on the whole ratable property within the municipality a sum sufficient to pay all debts of the

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corporation, and that the use of a portion of the money so raised in paying the expenses of the maintenance of the police force was in performance of the statutory duty to appropriate for and pay such remuneration to the force as the board may determine, and to provide and pay for all such things as the board may require for the use of the force; which is a very different thing from collecting the money as the consideration for a promise on the part of the city to protect the plaintiffs against crimes of violence.

The statements of claim must be struck out and the actions dismissed, with costs, if demanded.

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[MIDDLETON, J.]

RE PORT ARTHUR WAGGON CO. LIMITED.

TUDHOPE'S CASE.

SHELDEN'S CASE.

Company—Winding-up—Contributories—Application for Shares—Allotment—Notice—Acceptance—Special Contract as to Payment—Transfer of Shares not Paid for—Approval of Directors—Liability to Calls—Resolution of Directors—Dominion Companies Act, R.S.C. 1906, ch. 79, secs. 58, 59, 65, 66—"Call" Made upon Directors' Shares only—Invalidity as "Call"—Novation—Powers of Company—Surrender—Compromise—Sale of Claims by Liquidator—End of Liquidation.

In March, 1910, T. applied for shares in the company, which had been incorporated in January, 1910, under the Dominion Companies Act, R.S.C. 1906, ch. 79. His application was addressed to the directors, and read: "I hereby apply and subscribe for 100 shares . . . and agree to accept same, or any lesser amount that may be allotted to me, and agree to pay for the same as follows: 20% on signing hereof and 10% each succeeding month until fully paid. . . . I hereby authorise the secretary . . . to register me on the books of the company as holder of said shares." The 100 shares were allotted to T., notice of allotment was given to him, and he became a shareholder, director, and president of the company, but paid no part of the price of the shares:—

Held, that the allotment and notice amounted to an acceptance of the offer contained in the application; and, under the contract thus formed, T. did not become a subscriber for shares subject to call, but a subscriber upon the terms of the contract—the payments of 20 per cent. and 10 per cent. became due by virtue of the contract, and were not "calls" within the meaning of the Act, secs. 58 *et seq.*

In August, 1910, T. desired to retire from the company, and made an arrangement with his co-directors for relief from liability in respect of his subscription. This was in consequence of a change in the policy of the company. On the 26th August, 1910, T. signed a memorandum of transfer to L. of "all my rights under this subscription," and L., in writing, accepted the transfer. At a meeting of the directors held on that day, T.'s resignation as a director was accepted, and a resolution passed approving and sanctioning the transfer of T.'s subscription. At the same meeting it was resolved

"that a call be made upon the directors for payment of 25 per cent. of the amount of their subscriptions." The appropriate entries transferring the shares from T. to L. were made in the books of the company. The arrangements between T. and his co-directors were made honestly, in good faith, and before the company had incurred any substantial liabilities. The company afterwards went actively into business, incurred large liabilities, and soon became insolvent; a winding-up order was made in January, 1913. In the winding-up the liquidator sought to make T. a contributory in respect of the 100 shares, and the Master found T. liable, for the reason, among other reasons, that payments were in arrear under the terms of his subscription, and the shares could not, as the Master thought, be validly or effectively transferred:—

Held, upon appeal from the Master's ruling, that sec. 66 of the Act, which provides that "no shares shall be transferable until all previous calls thereon are fully paid in," did not apply to T.'s subscription—his liability thereon was not a liability for "call," and the shares held by him were not subject to call.

Re Peterborough Cold Storage Co. (1907), 14 O.L.R. 475, explained and distinguished.

Held, also, that the directors' resolution purporting to make a "call" had no operation on T.'s shares; indeed, the "call" had no validity as such, for it purported to be a call upon the shares held by the directors only, and the very essence of a call is that it shall bear equally upon all shares allotted; and there was nothing to prevent the directors assenting to the transfer of T.'s shares, for there was no "call" in arrear.

Held, also, that there was a novation, the company accepting L. as transferee of the shares, and L. accepting T.'s position as holder of the shares.

If the dealings did not amount to a novation, T.'s liability was not such as could be enforced by a call; the remedy would be by an action upon his promise to pay; he would be liable as a debtor and not as a contributory.

In re Hoylake R.W. Co., Ex p. Littledale (1874), L.R. 9 Ch. 257, followed.

Dictum of Duff, J., in *Smith v. Gow-Ganda Mines Limited* (1911), 44 Can. S.C.R. 621, at pp. 625, 626, dissented from.

Held, also, that the transaction was not in the nature of a compromise; nor was there a surrender of the shares—though, *semble*, an agreement to surrender might be made by a company of Dominion incorporation.

Semble, also, that, while the liquidator might sell any claim which he might have as liquidator, and the *chose in action* would become vested in the purchaser, he could not sell the right to use the machinery of the Winding-up Act. When he has sold the assets of the company, it is his duty to distribute the proceeds; and, when that is done, the liquidation ends.

Held, therefore, that T. was not liable as a contributory; and the same considerations applied to the case of S., who had subscribed for shares on the strength of T.'s connection with the company, and, desiring to retire when T. retired, was permitted to transfer his shares.

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APPEALS by Tudhope and Shelden from an order of the Master in Ordinary, in the course of the winding-up of the company, upon a reference to him for that purpose, placing the appellants upon the list of contributories.

March 1. The appeals were heard by MIDDLETON, J., in the Weekly Court, Toronto.

W. N. Tilley, K.C., for Tudhope.

D. C. Ross, for Shelden.

J. W. Bain, K.C., for the liquidator.

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March 18. MIDDLETON, J.:—The Port Arthur Waggon Company Limited was incorporated under the Dominion Act on the 11th January, 1910. On the 25th January, 1913, it was declared to be insolvent and ordered to be wound up.

At the time of the organisation of the company, it was contemplated that an agreement should be made between it and the Tudhope-Anderson Company, carrying on business at Winnipeg, under which that company should manufacture waggons for this concern under an agreement. On the strength of this contemplated arrangement, Tudhope, who was largely interested in the Tudhope-Anderson Company, subscribed for stock. Before this company commenced operations, negotiations were entered into with the Speight Waggon Company of Markham, a business rival of the Tudhope-Anderson Company, and it was deemed that it would be more advantageous for the company to come to terms with the Speight company than to carry out the contemplated arrangement with the Tudhope-Anderson Company. It was recognised that, if this should be done, as a matter of fairness Mr. Tudhope should be relieved from his subscription for stock, and accordingly he was allowed to transfer his stock to Mr. W. J. Lindsay, one of the promoters of the company, and an agreement was executed cancelling a contract that he had signed between the company and the Tudhope-Anderson Company. All this took place in 1910, while the company was as yet in an entirely embryonic condition. After the agreement with the Speight company had been executed, the company went actively into business, incurred large liabilities, and in a short time became insolvent. During all the time which elapsed from Mr. Tudhope's retirement until the liquidation, it was assumed that his retirement had been effectual, and he was not regarded or treated in any way as a shareholder of the company. In the course of liquidation, the circumstances surrounding his retirement were investigated, and in the result he has been placed on the list of contributories.

When Mr. Tudhope retired, it was thought that the people who had offered to subscribe for the stock might have been induced to subscribe by the fact of Mr. Tudhope's connection with the company, and it was thought right to send them a circular advising them of the change of policy, and giving all those who desired to retire from the company an opportunity to transfer their stock-

holdings. Shelden, who had gone into the company on the strength of Mr. Tudhope's connection with it, availed himself of this option, and transferred his stock, and thereafter assumed that he had no further connection with the company.

In all this every one acted with perfect honesty. There were no creditors, or at any rate no creditors claiming any substantial amount, and all that was done was done in good faith in recognition of the fact that it would be unreasonable to expect Mr. Tudhope to implement his subscription when the company desired as a matter of business policy to withdraw from the agreement made with the company with which he was identified.

Turning now to the documents which the Master thinks fixed liability on these gentlemen, first to be considered is the application of Mr. Tudhope for stock. It is worded as follows:—

"To the Directors. I hereby apply and subscribe for 100 shares of the seven per cent. preferred stock of the above company, at the par value of \$100 per share, and agree to accept same, or any lesser amount that may be allotted to me, and agree to pay for the same as follows:—20% on signing hereof and 10% each succeeding month until fully paid.

"Enclosed please find \$ being first payment on my subscription.

"I hereby authorise the secretary of the company to register me on the books of the company as holder of said shares.

"Dated this day of A.D. 1910.

"Signature, James B. Tudhope. Occupation——

"Address, Orillia."

On the 22nd March, 1910, probably the date on which the subscription was signed, this stock was allotted to Mr. Tudhope. It is not denied that notice of allotment was duly given and that he became a shareholder of the company. He was elected a director, and became president of the company, and attended its meetings from time to time. No part of the price of his stock was paid.

At the meeting of the directors on the 5th August, 1910, the negotiations for the substitution of an agreement with the Speight company for the agreement with the Tudhope-Anderson Company had so far advanced that a resolution was passed accepting the offer of the Speight company "to sell to the Port Arthur Waggon

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Company Limited its stock in trade, contracts, goodwill, patents, and its whole undertaking and assets, for seven hundred and fifty shares of the preferred stock and twenty-five thousand dollars in cash," plus the stock in hand at cost price.

Immediately after this resolution is a resolution dealing with Mr. Tudhope as follows:—

"Mr. James B. Tudhope informed the directors, through the secretary, Mr. Fox, that he was retiring from the company with all his interests on the following conditions: (1) To be relieved of his liability on the stock subscribed of 100 shares, and his application returned. (2) That all shareholders having subscribed for stock up to the date of the acceptance of this offer to have the opportunity to cancel their subscriptions, and to be relieved from all liability thereunder. (3) To be relieved from all liability incurred either by the company or by the directors at the present time. A circular to this effect will be sent out to all the shareholders. Resolved, on the motion of Mr. Starr seconded by Mr. Cameron, that this board of directors accept Mr. Tudhope's proposition, and the executive officers be authorised to carry out the same."

When these minutes came to be read at the next meeting, they were amended by adding to the above, "That the contract between the Port Arthur Waggon Company Limited and the Tudhope-Anderson Company Limited be completed by the first named company as already agreed upon." This contract, it is admitted, was a contract releasing the former agreement by which the Tudhope-Anderson Company undertook to manufacture for the Port Arthur company certain waggons.

Pursuant to these instructions, the rescinding agreement was executed, and Mr. Tudhope transferred his stock to Mr. Lindsay. This transfer was as follows:—

"Toronto, August 26th, 1910. I hereby transfer to W. J. Lindsay all my rights under this subscription. James B. Tudhope. Witness, Jas. H. Spence." Under which is written:—"I hereby accept the above transfer. W. J. Lindsay. Witness, Jas. H. Spence."

As appears by the minutes, on the 26th August Mr. Tudhope tendered his resignation as director, which was accepted, and a resolution was passed "that the transfer of Mr. J. B. Tudhope's subscription be approved and sanctioned."

At the same meeting, entered immediately above the resolution quoted, is the following:—

“Proposed by J. H. Spence, seconded by T. H. Speight, that a call be made upon the directors for payment of twenty-five per cent. of the amount of their subscriptions, being ten per cent. on application and fifteen per cent. on allotment.”

The appropriate entries transferring the stock were made in the books of the company, and the agreement with the Speight company was completed. It does not appear to me to be profitable to follow the dealings of the company further. It is enough that insolvency resulted.

The Master has held that Tudhope is liable because payments were in arrear under the terms of his subscription, and, therefore, the stock could not be validly or effectually transferred. He also regards the arrangements come to as in effect a surrender of the shares and not as a transfer. He also suggests that the transaction between Tudhope and the company cannot be regarded as a “compromise,” and for this reason he is not relieved from his liability.

In addition to contesting liability, Mr. Tudhope attacks the validity of the entire proceedings under which it is sought to make him liable, upon the ground that the liquidation has come to an end.

After the winding-up had proceeded to some extent, on the 11th July, 1913, an agreement was made between the liquidator of the company and one John M. Wiley. This agreement recited the liquidation proceedings, and that Wiley had formed a syndicate for the reorganisation of the business of the company, and obtained subscriptions to such syndicate, and caused to be incorporated a new company, and on behalf of this company had offered to purchase from the liquidator “the whole assets” of the company for the consideration mentioned; that this had been recommended to the Court by the liquidator, with the sanction of the creditors and shareholders of the company, and that at a meeting called for the purpose of considering it, the proposed scheme of reorganisation had been accepted; it was, therefore, agreed that the purchaser should take over all the assets of the company, indemnify the liquidator with respect to any liability he might be under, and deliver to the liquidator notes of the new company for the amounts

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of the claims of the creditors, payable in 6, 12, and 18 months, the liquidator to do such things "as may be necessary for the more effectually vesting in or realising for the new company the benefits of the transfer hereinbefore mentioned, and in particular the liquidator shall, at the expense of the new company, and at its request, and subject to its control, (a) take all such proceedings against persons liable to contribute to the assets of the vendor as the new company may require, including the making of calls upon any of the unpaid shares of the vendor."

Following this, Wiley transferred the agreement to the Port Arthur Waggon and Implements Limited, the new company, and on the 14th July, 1913, an agreement was made between the company in liquidation and the new company by which were transferred to it all its assets, *inter alia* "(g), the full benefit of all subscriptions to the capital stock of the vendor, and of all amounts unpaid thereon, whether already called or hereafter to be called," all this being approved by the Master in Ordinary.

It is stated that the new company has in its turn gone into liquidation, and that these proceedings are now being carried on in the name of the liquidator of the original company for the benefit of the liquidator of the new company. The contention is that upon the sale of the assets the liquidation, as a liquidation, came to an end, and that the purchaser of the assets must enforce any claims that he may have by action, and he cannot continue the liquidation.

Dealing first with the situation of Mr. Tudhope, I think the allotment of the stock and the notice of allotment amount to an acceptance of the offer contained in the subscription. A contract was thus formed. Under it Tudhope did not become a subscriber for stock subject to call, but he became a subscriber for stock upon the terms of the contract, that is to say, that he agreed to pay for his stock 20 per cent. upon the signing of the subscription, and 10 per cent. in each succeeding month. In my view, these payments became due by virtue of the contract, and they are not, in the true sense of the term, "calls" within the meaning of the Act.

I have not considered whether it is competent for a company to enter into such a special agreement with individual shareholders. Much may be said indicating that this mode of sub-

scription for stock is entirely foreign to the underlying principle of the Companies Act. That Act seems to contemplate a subscription for stock subject to call so that all stockholders shall be upon a parity.

But, assuming that such an agreement is competent, the questions then are: first, whether this liability in respect of this stock brings the case within the prohibition of the statute against the transfer of stock upon which a call is in arrear; and, secondly, if so, what is the effect of a transfer in violation of the terms of the statute?

By the Dominion Companies Act, R.S.C. 1906, ch. 79, sec. 65, it is provided: "No transfer of shares whereof the whole amount has not been paid in shall be made without the consent of the directors." By sec. 66 it is provided: "No shares shall be transferable until all previous calls thereon are fully paid in."

Reliance is placed by the liquidator upon the decision by the late Chancellor Sir John Boyd in *Re Peterborough Cold Storage Co.* (1907), 14 O.L.R. 475. That was a case in which the stock had been allotted upon subscription, 25 per cent. being payable upon subscription and 25 per cent, on allotment. The directors who had not paid what was due, knowing the company to be insolvent, contrived, as they thought, to free themselves from liability. They procured five persons of no substance to whom they transferred all their stock, except one share each, and upon the company going into liquidation they relied upon this as freeing them from liability. The real gist of the holding is that the whole contrivance was a fraud and an abuse by the directors of the power given to them to assent to a transfer, for it had been exercised not in the interests of the company but in the interests of the directors as individuals, and for the purpose of defeating the rights of the creditors and of the shareholders.

I do not understand that, in the view of the Chancellor, the case was brought within the provisions of the Ontario statute. He says (pp. 476, 477): "The transaction is within the mischief guarded against by sec. 30 of the Act R.S.O. 1897, ch. 191. That enacts that 'no share shall be transferable until all previous calls thereupon be fully paid.' Technically there was no call made, but there was 25 per cent. exacted from the subsequent subscribers for shares by the directorate, and they excused them-

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selves from making a like contribution to the funds of the company." I think the real reasoning of the Chancellor is this: The policy of the Act is clearly indicated by sec. 30, and this makes it plain that it was the duty of the directors to see that no assent should be given by them to the transfer of stock upon which any payment was due, and it was on the violation of this duty that the liability, in truth, rested.

A call is defined in Halsbury (Laws of England, vol. 5, para. 268) as being the claim for "any amount which has not been paid or satisfied on a share, made by the company or its governing body from its members prior to winding up, or by its liquidator when it is in course of winding up."

The Dominion Companies Act, sec. 58 *et seq.*, deals with calls, and it is clear from the provisions of the statute that what is contemplated is a call made by a resolution of the directors, for sec. 58 provides that it is the duty of the directors to make a call of not less than 10 per cent. upon the allotted shares within a year from incorporation, and that the residue shall be called in and made payable when ordered by the letters patent or by the by-laws of the company. Section 59 provides that "a call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed."

In *Croskey v. Bank of Wales* (1863), 4 Giff. 314, it was held that "a payment required to be made by the subscribers upon allotment is not a call;" Vice-Chancellor Stuart saying (pp. 330, 331): "This is a question of construction as to what a call is, and here it is as plain as language can shew that by the memorandum of association, which is the contract between the parties, and the prospectus, there is a difference made between a payment on deposit, a payment on allotment, and a call. . . . A call is a thing which cannot be made until shares have been allotted."

Chief Baron Kelly in *Hubbersty v. Manchester Sheffield and Lincolnshire R.W. Co.* (1867), 8 B. & S. 420, speaking of instalments payable in respect of subscriptions for preference shares, during the course of the argument, asks (p. 421): "Are the three instalments by which the preference shares were to be paid up a 'call?'" And in the course of the judgment he says: "Speaking for myself, I doubt whether the payment on those shares can properly be termed a call."

In *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, the matter is put very plainly by Lindley, M.R. (p. 64): "Further, if more shares than those taken by the subscribers of the memorandum" (i.e., the original incorporators) "are issued by the directors, there is nothing to prevent them from offering those shares on such terms as regards payment to the company on application and allotment as the directors may think expedient. Payments so required to be made are not calls, because the payments are to be made by persons who are not yet members; but, when made, those payments must be treated, unless otherwise agreed, as payments on account of the nominal capital of the company, and as reducing *pro tanto* the liability of those who pay. Such persons have nothing to complain of if they pay according to their bargain, and the subscribers of the memorandum pay according to theirs."

For these reasons, I conclude that the liability of Mr. Tudhope upon his subscription was not a liability for "call," and that the stock held by him was not subject to call.

Dealing next with the resolution passed on the 26th August purporting to make a call, if my opinion is correct it could have no operation on Tudhope's stock; but, in the second place, I do not think it a valid call at all, for it purports to be a call upon the stock held by the directors. The very essence of a call is that it should bear equally upon all stock allotted. I doubt if the resolution was intended to be more than a request to the directors of the company to pay up on stock for which they had already subscribed and in respect of which they were in arrear, having regard to the terms of subscription; and furthermore it appears to me plain that it could not have been intended to be a call within the technical meaning of the statute so as to prevent the transfer of Tudhope's stock, for it was contemporaneous with the resolution permitting the transfer.

The statute must be considered as it stands, and there was nothing to prevent the directors assenting to the transfer of the stock, for there was no "call" in arrear.

When the company accepted Tudhope's subscription, he became liable upon the contract to take the stock and to pay for it in accordance with the terms of his subscription. His liability was one that would not run with the stock so as to free him from liability upon the transfer, but there was nothing to prevent a novation by dealings between the company and the transferee.

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Here the evidence is clear that there was a novation. The company accepted Lindsay as transferee of the stock, and Lindsay accepted Tudhope's position as the holder of the stock. The novation was complete, and the stock continued to exist; it was not surrendered nor destroyed, but transferred.

But, even if there were not such dealings as would, in law, amount to a novation, Tudhope's liability was not, in my view, a liability that could be enforced as a call, but by an action upon his promise to pay. The situation is precisely as if he had given to the company a series of promissory notes at the time he became a stockholder.

The true situation is that indicated in *In re Hoylake R.W. Co., Ex p. Littledale* (1874), L.R. 9 Ch. 257, an authority of value here as shewing that a transfer of shares, even if calls are due, is not void and invalid so that the shareholder is left liable as a contributory. He ceases upon the record of the transfer to be liable to be made a contributory, but remains merely a debtor to the company for the amount of the call then due. By parity of reasoning, it appears to me that here Mr. Tudhope, if liable at all, would be liable as a debtor, and not as a contributory. Littledale, who owed calls at the time of the transfer of his stock, it is there said (p. 260), was "not liable in law or in equity to pay or contribute to any debt of the company. He was merely in the position of a person who might owe money to the company. He could not be made a contributory for that purpose, or for the purpose of adjusting the rights of the contributories among themselves. We cannot make any debtor to a company liable as a contributory, because the money coming from him might be used for the purpose of settling the debts of the company or adjusting the liabilities between the shareholders. He was, to all intents and purposes, in exactly the same position as if his shares had been forfeited; that is, he would be a debtor for the call due at the time, if anything was due." This is a weighty decision by Sir W. M. James, L.J., and Sir G. Mellish, L.J., and so far as I can find it has never been questioned.

In the Supreme Court of Canada, in the case of *Smith v. Gow-Ganda Mines Limited* (1911), 44 Can. S.C.R. 621, there is a statement of Mr. Justice Duff's which is in conflict with the decision that I have just referred to. This statement was made without

any reference to that case, and I do not think it is more than a dictum—no doubt, of very great weight. The real point of the decision in *Smith's* case was that there was not at the time the stock had been issued to the plaintiff any stock that could be issued to him. Speaking of the stock on which the calls were in arrear, Duff, J. (pp. 625, 626), says: "The statute declares the shares themselves in such circumstances to be non-transferable; so long as any such calls remain unpaid they are *extra commercium*." The Ontario statute which there governed differs somewhat from the Dominion Act. I think that the English authority is binding upon me.

Being of opinion that Tudhope is not liable as a contributory, for the reasons given, I refrain from considering fully the other questions argued. I am quite clear that there was nothing here in the nature of a compromise. That is not the true ground upon which the bargain with Mr. Tudhope could be rested. It was in form, and in substance, a transfer of his stock, and I do not think that it was intended as a surrender by him of his stock. No doubt it was contemplated that Lindsay, the promoter, would sell this stock to those who were expected to come in on the strength of the new bargain made with the Speight company, and the stock was in that way to be paid for by those to whom Lindsay would transfer it; but, even if, as suggested by the liquidator, it was the intention that the stock should be surrendered, I am far from convinced that an agreement to surrender might not be made by a Dominion company, bearing in mind the recent decisions upon the question of *ultra vires*.

For the same reason, I refrain from considering at length the effect of the transactions between the liquidator and the new company. As at present advised, I am of opinion that the liquidator might sell any claim that he might have as liquidator, and the *chose in action* would become vested in the purchaser, but I do not think he could sell the right to use the winding-up machinery of the Act. When he has sold the assets of the company, it is his duty to divide the proceeds, and the liquidation ends. If the assets had been reduced to the form of a judgment, an execution might, no doubt, issue on the judgment, which would be assigned to the purchaser; but, if the claim is simply a *chose in action*, then the purchaser would resort to the ordinary machinery of the Court for its enforcement.

Middleton, J.

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The machinery provided by the Winding-up Act is for the liquidation of the company, and as soon as the company is liquidated the right to place it in operation ends.

What I have said applies with equal force to the case of Shelden.

For these reasons, I think the appeals should be allowed, and that the liquidator should pay the costs throughout. I trust that he has been prudent enough to make arrangements for his indemnity.

1918

[APPELLATE DIVISION.]

Nov. 30.

HAWLEY v. HAND.

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March 19.

Costs—Death of Defendant pendente Lite—Order to Continue Action Issued by Executrix—Form of Judgment against Executrix—Personal Liability for Costs—Discretion of Trial Judge—Appeal without Leave—Judicature Act, sec. 24.

The proper form of a judgment against an executor is, that the plaintiff recover debt and costs out of the assets of the testator if the defendant have so much, but, if not, the costs out of the defendant's own property.

In this case the executrix of the defendant, who died *pendente lite*, voluntarily assumed the defence of the action; and there was no good reason in law, or as a matter of discretion, why she should not pay the costs out of the estate or personally according to the above rule.

The Court could not review the discretion exercised by the trial Judge in awarding costs, no leave to appeal having been obtained: Judicature Act, sec. 24.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

THIS action was brought by Frederick M. Hawley against Havelock E. Hand, to recover damages for false representations alleged to have been made by the defendant whereby the plaintiff was induced to purchase certain shares of the stock of a company, and for delivery up or indemnity in respect of a promissory note made by the plaintiff.

May 30 and 31, 1918. The action was tried by FALCONBRIDGE, C.J.K.B., without a jury, at a Toronto sittings.

R. S. Robertson, for the plaintiff.

J. M. Ferguson, for the defendant.

After the trial, the defendant died, whereupon, upon the application of Jessica H. Hand, executrix of the will of the defendant, an order was made to continue the action against her, as such executrix, defendant by order to proceed.

November 30, 1918. FALCONBRIDGE, C.J.K.B.:—The defendant departed this life after the trial, and, by order to proceed, the action was continued against his executrix.

The plaintiff has proved his case. Exhibit 2, in the defendant's handwriting, is a most damning document, and the attempted explanation of it is not satisfactory.

The representations were in fact untrue, and, if not false to the knowledge of the defendant, were made recklessly with the purpose of inducing the plaintiff to purchase the stock, and they did induce him to purchase the same.

There will be judgment against the executrix as such for \$4,050 and costs and an order for the delivery up of the note in the pleadings mentioned or indemnity from liability thereon.

The operative paragraphs of the judgment as settled were as follows:—

2. This Court doth order and adjudge that the plaintiff do recover against the defendant Jessica H. Hand, as executrix of the said Havelock E. Hand, deceased, the sum of \$4,050 and his costs of this action forthwith after taxation thereof, such moneys and costs to be levied out of the property of the said Havelock E. Hand come to the hands of the defendant Jessica H. Hand to be administered if she has so much in her hands to be administered, and if she has not so much thereof in her hands to be administered, then the said costs are to be levied out of the property, goods, chattels, lands and tenements of the said defendant Jessica H. Hand.

3. And this Court doth further order and adjudge that the defendant Jessica H. Hand do forthwith deliver to the plaintiff or to whom he may appoint the promissory note in the pleadings mentioned, or in the alternative do give to the plaintiff a good and sufficient indemnity against all liability upon the said note, such indemnity to be settled by the Master in Ordinary in case the parties differ about the same.

Jessica H. Hand appealed from the judgment of FALCONBRIDGE, C.J.K.B., in so far as it required her to pay personally the plaintiff's costs of the action.

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March 19. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

J. M. Ferguson, for the appellant, argued that the executrix of the original defendant had not adopted the litigation, in which she wished to take no further part, and that she was therefore not personally responsible for the costs of the action. It was only when the personal representative was an active participant in the litigation that she could be made so responsible. He referred to Holmsted's Judicature Act, 4th ed., p. 766, and said that the case there cited of *Boynton v. Boynton* (1879), 4 App. Cas. 733, is distinguishable from this case. In *Watson v. Holliday* (1882), 20 Ch. D. 780, the trustee in bankruptcy took an active part in the litigation. He also referred to sec. 24 of the Judicature Act and *In re Silver Valley Mines* (1882), 21 Ch. D. 381.

R. S. Robertson, for the plaintiff, the respondent, relied upon the *Boynton* case, and also referred to *Borneman v. Wilson* (1884), 28 Ch. D. 53, as an example of how far the Courts would go in similar cases. The same principle was applied in *In re London Drapery Stores*, [1898] 2 Ch. 684.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—The proper form of judgment against an executor has always been that the plaintiff recover debt and costs out of the assets of the testator if the defendant have so much, but, if not, the costs out of the defendant's own property: executors and administrators have no advantage over other litigants as to costs: they were always liable to pay them *de bonis propriis* if there were no assets.

In this case the executrix voluntarily assumed the defence of this action, taking out herself the order continuing it against her: no doubt, in the expectation or hope that the judgment to be pronounced in it would be in her favour: but it was not.

There is, therefore, no good reason in law, or as a matter of discretion, why she should not pay the costs out of the estate or personally according to the rule which I have stated.

It is of course enough to dispose of this appeal to consider that there was power so to impose costs as I have mentioned: because we cannot review the discretion exercised in awarding them, no leave to appeal having been obtained: Judicature Act, sec. 24.

The appeal must be dismissed.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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Jan. 30

March 19

SIMPKIN AND MAY V. TOWN OF ENGLEHART.

Municipal Corporations—By-law—Water Supply of Town—Municipal Act, sec. 399 (70), (72)—Rates Payable by Persons not Abutting on Mains—Right to Compel User of Water.

Pursuant to sec. 399 of the Municipal Act, R.S.O. 1914, ch. 192, a by-law was passed by the council of a town corporation requiring that all rate-payers, tenants, and occupants residing within the limits of the corporation should use for drinking and domestic purposes the water supplied by the corporation and no other; providing also a punishment for any contravention of the by-law; and requiring also that all consumers of water, not directly abutting water mains or services, should pay certain low water rates, and that all persons abutting water mains or services should pay higher rates. The plaintiffs were persons not directly abutting water mains or services, and were rated as such. They said that they were not consumers, and so could not be rated:—

Held, that they were in the eye of the law consumers, whether they actually consumed much or little water or none; it was not practically impossible for them to obey the law; and they were liable for the rates imposed upon them.

Judgment of LOGIE, J., reversed.

ACTION for a declaration that the defendants, the Municipal Corporation of the Town of Englehart, could not lawfully assess, levy, or collect water rates from the plaintiffs; that the provisions of by-law No. 188 of the defendants, under which they purported to assess, levy, and collect water rates from the plaintiffs, were illegal and void; for an injunction restraining the defendants from assessing or collecting such rates; and for damages.

The action was tried by LOGIE, J., without a jury, at Haileybury.

George Ross, for the plaintiffs.

W. A. Gordon, for the defendants.

January 30. LOGIE, J.:—At the trial the following admissions were made by counsel:—

The plaintiff Simpkin lives on lot 311 on Seventh avenue, according to the plan of the Town of Englehart, and the plaintiffs the Mays live on lot 227 on the same avenue, according to the said plan.

The Mays' property is approximately 600 feet from the nearest water supply of the town, and Simpkin's property is 800 feet away.

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There is no water supply pipe along Seventh avenue from the intersection of First street and Seventh avenue—nor along First street from the waterworks situated thereon to Seventh avenue.

The plaintiffs are supplied with water only in the sense that the nearest non-freezable tap at which they may draw water is 600-800 feet away, viz., on First street opposite the waterworks.

The plaintiffs have never used the town water, but are being assessed for water rates under sec. 27 of the Public Utilities Act, R.S.O. 1914, ch. 204.

They are not being subjected to a special tax or rate under sec. 15 of that Act.

The plaintiffs do not attack the by-law as to its legality generally, but contend that sec. 56 of by-law 88 is illegal and invalid.

There are only 22 owners or occupants in the town of Englehart directly connected with the water mains.

Over 500 draw off water from public hydrants placed on the streets for the purpose.

By-law 88 of the corporation purports to be a by-law for the management, maintenance, and regulation of the Englehart waterworks, made by the Municipal Council of the Town of Englehart, under the provisions and by the authority contained in the Municipal Waterworks Act* and amendments thereto, and thereby the council established under schedule "A" thereof the rates complained of.

By sec. 51 of this by-law, the corporation was divided into five districts, as shewn in schedule "B," the consumers in each district carrying water from the town hydrants to be responsible for the maintenance and upkeep of these hydrants.

The plaintiffs are in area 1 as shewn in schedule "B."

The original by-law No. 77 of the corporation, authorising the construction of the waterworks and sewerage system and providing for the issue of debentures to pay for the construction of the same, and also by-law No. 88, were put in.

The waterworks and sewerage system were installed by the defendants at the instigation and following an adverse report of the Provincial Board of Health as to the sanitary condition of the town.

*The statutory provisions relating to Municipal Waterworks are now found in Part I. of the Public Utilities Act, R.S.O. 1914, ch. 204.

Under the circumstances above set forth, the plaintiffs contend that they are not liable to pay any water rates whatever.

By sub-sec. 1 of sec. 26 of the Public Utilities Act, applying to all municipal corporations owning or operating public utilities, "the council may pass by-laws for the maintenance and management of the works . . . and for the collection of the rates or charges for supplying the public utility . . . and for fixing such rates, charges and rents . . .," and, by sub-sec. 2 of the same section, "in fixing the rents, rates or prices to be paid for the supply of a public utility the corporation may use its discretion as to the rents, rates or prices to be charged to the various classes of consumers and also as to the rents, rates or prices at which a public utility shall be supplied for the different purposes for which it may be supplied or required." By sub-sec. 3 of the same section, the corporation may shut off the supply, in default of payment; but the rents or rates in default shall, nevertheless, be recoverable.

By sec. 27 of the same Act, "the sum payable by the owner or occupant of any building or lot for the public utility supplied to him there, or for the use thereof and all rents, rates, costs and charges by this Act to be collected in the same manner as rents or rates for the supply of a public utility, shall be a lien and charge on the building or lot and may be levied and collected in like manner as municipal rates and taxes are recoverable."

By sec. 45, the corporation may inspect any premises to which any public utility is supplied.

By sub-sec. 3 of the same section, "where a consumer discontinues the use of the public utility, or the corporation lawfully refuses to continue any longer to supply it, the officers and servants of the corporation may . . . enter the premises in or upon which such consumer was supplied with the public utility for the purpose of removing therefrom any . . . pipes . . . being the property of the corporation . . ."

By the Municipal Act, R.S.O. 1914, ch. 192, sec. 399, "by-laws may be passed by the councils of local municipalities . . . (70) . . . for making reasonable charges for the use of public water;" and (72) "for compelling the use within the municipality or any defined area therein, for drinking and domestic purposes, of water supplied from the waterworks of the municipality . . ."

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The plaintiffs are admittedly not consumers or users of municipal water.

Are they "supplied" within the meaning of secs. 26 and 27 of the Public Utilities Act, or sec. 399 of the Municipal Act? I think not.

The word "supplied" in para. 72 of sec. 399 of the Municipal Act, and the word "supplying" in sec. 26, and "supplied" in sec. 27, of the Public Utilities Act, must be read in their ordinary meaning.

The Standard Dictionary defines the word "supply" as "to furnish with what is needed or desired; provide."

I find that the defendants have not supplied the plaintiffs with water within the meaning of the Acts above in part set out; and are not, under the circumstances admitted by counsel, entitled to assess, levy, or collect any water rates from them.

This result is strengthened, I think, by the wording of secs. 27 and 45 of the Public Utilities Act, which clearly contemplate a supply of a public utility to premises where it may be consumed.

To reach a conclusion in this case it is not necessary for me to pass upon the validity of sec. 56 of by-law 88 of the defendants, and I do not make a decision as to this.

The plaintiffs have paid no water rates and have suffered no damage.

If this judgment stands, there will be no necessity for an injunction.

There will be judgment for the plaintiffs declaring that the defendants cannot assess, levy, or collect any water rates from the plaintiffs or any of them in connection with the lands set forth in the pleadings.

The plaintiffs are entitled to their costs of action.

The defendants appealed from the judgment of LOGIE, J.

March 19. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

J. M. Ferguson, for the appellants, argued that the provisions of the Municipal Act and of the Public Utilities Act gave the corporation the right to prohibit the use of such water as might endanger the health of the community, and to compel the

use of water supplied by the corporation. The trial Judge erred in giving too narrow a construction to sec. 26 of the Public Utilities Act and in holding that the plaintiffs were not supplied with water by the appellants within the meaning of that Act, and of the Municipal Act. Section 9 of the Public Utilities Act seemed to have been entirely overlooked at the trial. It contemplates the erection of hydrants and gives the corporation power to regulate their use and the rates to be paid for the same.

R. T. Harding, for the plaintiffs, the respondents, argued that the judgment of the trial Judge was right in its findings of fact and construction of the statutes.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—In the interests of public health the law permitted the municipality to require that all ratepayers, tenants, and occupants residing in the limits of the corporation should use for drinking and domestic purposes the water supplied by the corporation and no other: and the municipality did so, by by-law, providing also for the punishment of any contravention of such by-law.

The plaintiffs admittedly come within the provisions of the by-law.

The municipality also required by by-law, as they had power to do, that all consumers of water, not directly abutting water mains or services, should pay certain low water rates, and that all persons abutting the water mains or services should pay a higher rate.

The plaintiffs are persons not “directly abutting water mains or services,” and were rated as such.

But they say they are not “consumers,” and so cannot be rated.

The by-law, however, compels them to be consumers: they are by law “compelled to ‘use’ . . . the water supplied by the corporation” and no other; and so are plainly intended to be included in the word “consumers,” whether they actually consume much or little or none. They are in the eye of the law consumers, and cannot escape from paying for their rights in this public benefit, by setting up that they are offenders against the law: if in truth they really are.

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The case is not one in which it would be practically impossible for the plaintiffs to obey the law; if it were, rates would not be imposed until the water should be brought near enough to be used as the law requires.

The appeal is allowed; and the action must be dismissed.

Appeal allowed.

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March 21

[APPELLATE DIVISION.]

MCARTHUR V. NILES LIMITED.

Crops—Seed Supplied by Merchants to Tenant of Farm—Agreement—Crops to be Property of Merchants—Right of Landlord under Prior Agreement or Lease to Portion of all Crops Grown—Crops Forming Part of Land until Severance—Taking by Merchants after Severance—Conversion.

On the 1st March, 1917, the plaintiff leased his farm to S. for a year, S. paying \$1 and statute labour taxes only, but also agreeing to allow the plaintiff "one-third share . . . of the whole crop of the different kinds and qualities which shall be grown upon the . . . demised premises." On the 12th April, 1917, S. made an agreement with the defendants (seed-merchants), under which he received from them 24 bushels of pease, for seed, agreeing that "the crop growing, and in all its conditions, should be and remain at all times the property of the defendants," who were to be at liberty to supervise the same before or after harvest; and, upon harvesting, the entire crop was to be delivered to the defendants, who would pay him \$2 per bushel for the produce, less \$2 per bushel for the seed supplied. The crop grown, though supervised by the defendants, was harvested by S., and an adjustment took place between S. and the plaintiff by which 40 bushels of pease, the plaintiff's share of the pease produced, after deducting 24 bushels to be allowed for seed, were delivered to the plaintiff and placed by him in a building on the farm. The defendants, on the 6th November, 1917, broke into this building and removed the pease, claiming them under their agreement with S.:—

Held, that the plaintiff was entitled to succeed in an action for the conversion of the 40 bushels of pease.

Per MEREDITH, C.J.C.P., and BRITTON, J.:—When the lease was made, the plaintiff acquired a right to one-third of all crops grown by S. on the plaintiff's land, without any right in S. to make for the plaintiff, as well as himself, the agreement which he made with the defendants.

Per LATCHFORD, J.:—When S. made the agreement with the defendants, he had not the power to transfer to them what he had previously transferred to the plaintiff. The defendants' entry was a trespass, and their removal of the pease a conversion.

Burnett v. McBean (1858), 16 U.C.R. 466, referred to.

Per MIDDLETON, J.:—Although under the agreement with S. the property in the seed pease remained in the defendants, it was contemplated that the pease should be sown upon the plaintiff's farm. When these pease were sown, or at any rate when grown, they became part of the land—*Quicquid plantatur solo solo cedit*. The crop during the whole time of its growth was not a chattel, but remained part of the land. S., by virtue of his tenancy, had the right to cut and harvest the crop, and so convert it into a chattel, and upon its severance it became a chattel, and then became vested, in accordance with the terms of the agreement between S. and the plaintiff, which alone gave S. the right to cut it, and an undivided third was the

property of the plaintiff. Crops growing on land are part of the land, but it is open to the owner of the land, at any rate when the crops have reached maturity, to treat them as chattels. Here the plaintiff never agreed to treat this crop as chattels except upon the terms that he should be entitled to an undivided one-third of the crop when converted into chattels. Review of the authorities.

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AN appeal by the defendants from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiff, for the recovery of \$147 and costs, in an action in the County Court of the County of York, brought to recover damages for wrongful entry on the plaintiff's land and removal and conversion of 40 bushels of pease.

The reasons for the judgment of the County Court Judge were as follows:—

The facts of this case, though not admitted, are practically undisputed.

The plaintiff obtained possession of the pease in question under an agreement with his tenant Stutt, under which the plaintiff took these pease and other produce in satisfaction of the tenant's obligations, and the tenant gave up possession on the 17th October, 1917.

At the time this arrangement was entered into, and the plaintiff took possession of the pease as his own, he, the plaintiff, had no notice or knowledge that the defendants claimed, or had any contract under which they might claim, these pease. It is true that the tenant did tell the plaintiff that the defendants were entitled to 24 bushels of pease which were to be delivered to them, but these 24 bushels were returned to the defendants, and are not now in question. The plaintiff took delivery and possession of the pease in dispute, and stored them away in a building, not on the premises on which the pease were grown, but on premises near-by. The plaintiff must be regarded in the light of an innocent purchaser for value.

The rights of the parties, it seems to me, depend entirely upon the construction placed upon the contract between the defendants and Stutt, and the legal consequences of such contract so construed. As I read the contract, it is in effect a sale, first of all, of the 24 bushels of seed pease. Stutt is to pay for the seed in any event at \$2 a bushel. This seed is "supplied" by the defendants, and Stutt agrees to pay for the same, and there is no reservation of ownership in the seed as distinguished from the crop, for the

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sufficient reason that such a reservation is useless in the case of seed supplied to be at once sown. The remaining provisions of the contract relate to the crop to be afterwards grown or acquired from this seed. This is to be at all times the property of the defendants. As between the parties to the contract, this provision is, no doubt, valid. But I can see no reason for refusing to apply to this case the legal principle that a grant of future-acquired chattels confers only an equitable interest therein upon the grantee; and if, when they come into existence, but before the grantee takes possession thereof, the legal estate and interest therein, without notice of the grantee's existing equitable interest, become vested in another person, the latter is entitled to the future-acquired chattels comprised in the grant and becomes the owner thereof both at law and in equity: *Joseph v. Lyons* (1884), 15 Q.B.D. 280; *Hallas v. Robinson* (1885), 15 Q.B.D. 288; *Holroyd v. Marshall* (1862), 10 H.L.C. 191. And, apart from this principle of law, I do not think that the parties intended that the property in the pease in question should actually pass until the crop was grown and harvested and weighed, for there is a significant clause in the contract which leads to the opposite conclusion. Stutt agrees that he "shall not withhold any part thereof or transfer or sell any part thereof to any other party or parties whatsoever." If the parties intended that the property in the pease to be grown should pass upon the execution of the contract, such a provision against selling to any one else would not be necessary; for, if the property passed, Stutt could not, if he wished, make a valid sale to another. This clause is based upon the assumption that Stutt could or might confer upon a purchaser a title to the crop, and therefore provides that he shall not do so. In this view of the law and under this construction of the contract, the plaintiff is entitled to judgment.

I cannot help regarding what the defendants did as a high-handed and profitable proceeding for them. They had already more than recouped themselves when they got back the 24 bushels, and might have been satisfied with that, though, of course, they are entitled to demand what they conceive to be their full legal rights.

The plaintiff is entitled to the value of his 30½ bushels of pease, which I place at \$4 a bushel, or \$122. I also allow the

plaintiff \$25 for the trespass committed upon the premises, making a total of \$147.

There will be judgment for this sum and the costs of the action.

March 4. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

McGregor Young, K.C., for the appellants, argued that the learned trial Judge had erred in finding the plaintiff entitled to succeed on the ground of being in the same position as an innocent purchaser for value without notice, because no title had ever passed from the appellants to Stutt: *Langton v. Higgins* (1859), 28 L.J. Ex. 252. But, even if the appellants did sell the 24 bushels of pease to Stutt, yet, as soon as the crop came up, it became the crop of the appellants. A present grant of potentially existing things takes effect as soon as the things are extant: Benjamin on Sale, 5th ed., pp. 128 to 134, and also p. 137; *Burnett v. McBean* (1858), 16 U.C.R. 466; *Kelsey v. Rogers* (1882), 32 U.C.C.P. 624.

J. J. Maclellennan, for the plaintiff, respondent, contended that the learned trial Judge was right in his reasoning and in his conclusions, and that the cases cited by him were binding upon the Court. The lease from the respondent to Stutt ante-dated the agreement between Stutt and the appellants, and so the agreement in the lease that the respondent should get one-third of all the crops grown on the land cut out of consideration, so far as the respondent was concerned, the agreement between Stutt and the appellants. When Stutt made the agreement with the appellants, he had no right to transfer to them what he had already transferred to the respondent. This was not a case of a thing in potency becoming extant so much as it was a case of after-acquired goods, like goods brought into a store to replace others under a chattel mortgage.

Young, in reply.

March 21. MEREDITH, C.J.C.P.:—This is one of those cases in which the question involved is more than half answered when it is quite understood.

The material facts are simple, and not disputed. The plaintiff owns the land upon which the crop of pease in question was grown; one Stutt acquired some interest in the land—either

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as "cropper" or tenant—and afterwards entered into the contract with the defendants under which they claimed and took possession of the pease.

Under this agreement—quite a common one in these days—Stutt was to grow, upon the plaintiff's land, the pease in question, for the defendants, who were to supply the seed and might supervise the crop and enter on the land to bestow upon it, before or after harvest, any labour of their own to enhance its quality or purity or to avoid unreasonable delay in the delivery thereof; and whose property the crop growing "in all its conditions shall be and remain at all times."

It cannot reasonably be doubted that such an agreement is quite a valid one in law, whether the pease became or did not become at any time part of the land. The agreement is in writing, signed by both parties to it.

The only question there can be is, whether the plaintiff had a prior right to the pease in question under the transaction between Stutt and him.

That transaction is evidenced by a printed lease of a very formal character, which is signed by the parties to it, and purports, in proper technical language, to be a demise of the land for one year, the rent reserved being \$1, payable on the day of the date of the lease, "and one-third share or portion of the whole crop of the different kinds and qualities which shall be grown upon the said demised premises."

If the transaction were really a demise of the land, giving the tenant the exclusive right of possession of it for the year, with a right in the landlord only to distrain for rent at the end of the year, it ought to be obvious that he had no right which could prevent Stutt making the bargain which he did make with the defendants: and that no delivery of the pease by Stutt to the plaintiff could deprive them of their right to them.

On the other hand, if the form of the transaction be disregarded, and if it be considered one under which the plaintiff was at all times to have a one-third share of all the crops grown upon his land, it may well be that that earlier right should prevail over the later-acquired rights of the defendants, provided that, under the real agreement between this plaintiff and Stutt, Stutt had not power to make such an agreement as that which he actually made with the defendants to grow the seed pease for them.

So that it really all comes down to that simple question: did the plaintiff acquire a right to one-third of all crops grown by Stutt on the plaintiff's land, without any right in Stutt to make for the plaintiff, as well as himself, the agreement he did make with the defendants—acquire it when the lease was made? If so, this appeal should be dismissed, otherwise it should be allowed and the action should be dismissed.

Under all the somewhat unusual circumstances of the case, I incline to the view that the plaintiff did acquire such a right without conferring on Stutt such a power, and so would dismiss the appeal. The plaintiff was to have one-third of the crop; and no time was fixed for payment of the rent if the one-third of the crop was merely rent reserved. All the circumstances point, perhaps, more to “working on shares” than to a real demise, though there is much to be said in favour of the view that the one-third of the crop which the landlord was to have is, as to the crop of pease in question, one-third of the gross income from the transaction with the defendants.

We all agree in this: that the appeal should be dismissed.

BRITTON, J., agreed with MEREDITH, C.J.C.P.

LATCHFORD, J.:—As between the plaintiff and his tenant Stutt, the plaintiff was, by the terms of the lease, entitled to receive from Stutt one-third in kind of all the crops grown during 1917 on the demised lands. One of such crops was the crop of pease grown by Stutt from the seed supplied to him by the defendants under an agreement, made subsequent to the lease, which provided that the pease grown from such seed should “in all conditions”—that is, after as well as before severance—be and remain the property of the Niles company. The plaintiff was not a party to the agreement between Stutt and the defendants.

When Stutt thus agreed that the defendants should be entitled to all the crop of pease, he was subject to a covenant to deliver one-third of that very crop to the plaintiff.

I am firmly of the opinion that, when Stutt made the agreement with the defendants, he had not the power to transfer to them what he had previously transferred to the plaintiff. The case is one in which the maxim applies: *Nemo plus juris in alium transferre potest quam ipse habet*.

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Stutt recognised the prior right of the plaintiff by delivering to him one-third in kind—and not more—of the pease grown on the leased lands. That third became the plaintiff's property; it was removed off the lands leased to Stutt and passed into the plaintiff's possession as rent received by virtue of the demise. It was in his possession as absolute owner, when the defendants, without his knowledge, entered upon the premises where he had stored it and removed it to their own warehouse.

The learned trial Judge held that the defendants' entry was a trespass, and their removal of the pease a conversion; and that they are liable in damages for the trespass and for the value of the pease.

I agree in his conclusions. The case of *Burnett v. McBean*, 16 U.C.R. 466, cited in support of the appeal, is, I think, fatal to it. There the plaintiffs had agreed with one Dean that they would supply wood for burning bricks, which he was to make for them. The cost of the wood was to be deducted from the price to be paid for the bricks. The plaintiffs supplied the wood and Dean made and burned the bricks. Afterward Dean assumed to transfer the bricks to the defendant, who prevented the plaintiffs from taking possession of them. Draper, C.J., left the case to the jury with an instruction that if the bricks were to be manufactured for the plaintiffs, and were to be theirs as they were made without any delivery, then the plaintiffs should recover. The jury having found for the plaintiffs, the direction was held to be proper by a full Court—Robinson, C.J., and McLean and Burns, JJ.

This case seems to me to have decided nothing more than that the subsequent could not prevail against the prior agreement.

In *Bank of British North America v. McIntosh* (1897), 11 Man. R. 503, a strong Court, Taylor, C.J., Killam and Bain, JJ., held, on an appeal in an interpleader issue, that an agreement to create a merely equitable charge upon a crop prevailed as against an execution creditor.

I am of opinion that the appeal should be dismissed with costs.

MIDDLETON, J.—The plaintiff is the owner of a farm in the township of King. On the 1st March, 1917, he leased this farm

to one Stutt for one year, the tenant paying \$1 and statute labour taxes only, but also agreeing to allow to his landlord "one-third share or portion of the whole crop of the different kinds and qualities which shall be grown upon the said demised premises."

On the 12th April, 1917, Stutt made an agreement with the defendants, who were seed-merchants, under which he received from them 24 bushels of pease, agreeing that "the crop growing, and in all its conditions, should be and remain at all times the property of the defendants," who were to be at liberty to supervise the same before or after harvest; and, upon harvesting, the entire crop was to be delivered to the defendants, who would pay him \$2 per bushel for the produce, less \$2 per bushel for the seed supplied.

The crop grown, though supervised by the defendants, was harvested by Stutt, and an adjustment took place between him and his landlord by which 40 bushels of pease, being the landlord's share of the pease produced, after deducting 24 bushels to be allowed for seed, were delivered to the landlord, and placed by him in a building on the land in question. On the 6th November, 1917, the defendants broke into the building and removed these pease, claiming them as theirs under the agreement with Stutt. The plaintiff then sued the defendants for the conversion of the pease in question.

The learned County Court Judge, in a considered judgment, has found in favour of the plaintiff, holding that, while the agreement between Stutt and the defendants was, no doubt, a valid agreement between them, he could "see no reason for refusing to apply to this case the legal principle that a grant of future-acquired chattels confers only an equitable interest therein upon the grantee; and if, when they come into existence, but before the grantee takes possession thereof, the legal estate and interest therein, without notice of the grantee's existing equitable interest, become vested in another person, the latter is entitled to the future-acquired chattels comprised in the grant and becomes the owner thereof both at law and in equity."

I have arrived at the same conclusion as the learned Judge, but base my decision upon somewhat different reasoning; and I think it is a matter of importance, in a community in which there are so many agreements for the farming of land upon shares, that this principle should be clearly enunciated.

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Although under the agreement with Stutt the property in the seed pease remained in the defendants, it was contemplated that the pease should be sown upon the plaintiff's farm. When these pease were sown, or at any rate when grown, they became part of the land, upon the principle indicated by the maxim *Quicquid plantatur solo solo cedit*—a maxim which, as shewn by the authorities collected in Broom's Legal Maxims, 8th ed., p. 314, applies to the case of seed sown, not merely by civil law, but according to eminent writers upon English law. The effect of the affixing of chattel property to land is to vest the title in the owner of the land and to change the nature of the chattel, and to make it part of the realty. This is so even as against the true owner of the chattel, *à fortiori* where the affixing was contemplated by the agreement under which possession was parted with: *Hobson v. Gorringe*, [1897] 1 Ch. 182.

The crop during the whole time of its growth was not a chattel, but remained part of the real estate. The tenant, by virtue of his tenancy, had the right to cut and harvest the crop, and so convert it into a chattel, and upon its severance it ceased to be real, and became chattel, property, and the property then became vested, in accordance with the terms of his agreement with the landlord, which alone gave him the right to cut it, and an undivided third was the property of the landlord: *Mills v. Brooker* (1919), 35 Times L.R. 261.

The suggestion is made that, because the seed belonged to the defendants, the crop harvested must also belong to the defendants—that it was merely a growth of the seed. Whether this is true as a matter of biology or not, it is not the principle which has been recognised in any of the somewhat numerous cases dealing with the question. Although the crop in one sense is derived from the seed, the seed had to die—the vital germ developed into the plant by absorbing the elements found in the soil, the air, and the water, and the energy derived from the sun. The seed harvested was formed from the germ in the ovary of the flower, and from the pollen, whence borne no one can tell. There is no such identity between the seed sown and the seed harvested as to enable the property to be traced. The view entertained in the cases, as already stated, is that the growth is derived from the soil, and until the growth is completed, at any rate, it forms part of the

soil. Any injury to it is an injury to the land, and the right to recover was, according to the old practice, by an action for trespass to the land. See *Crosby v. Wadsworth* (1805), 6 East 602; *Brereton v. Canadian Pacific R.W. Co.* (1898), 29 O.R. 57. In the case in East, the plaintiff had contracted with the owner of a close for the purchase of a growing crop of grass. It was held that he might maintain an action for trespass *qu. cl. fregit* against a person entering the close and taking grass, but he failed in his action because his contract was for the sale of an interest in or concerning land, and, therefore, not being in writing, was within the 4th section of the Statute of Frauds.

In *Mayfield v. Wadsley* (1824), 3 B. & C. 357, an outgoing tenant, who had sown wheat, sold the wheat to the incoming tenant. The purchaser did not pay. The vendor sued for the price of goods bargained and sold, and for goods sold and delivered. It was held that this was a sale of an interest in land.

In *Poulter v. Killingbeck* (1799), 1 B. & P. 397, the owner of the land let it to another, on condition that he should have a moiety of the crops. While the crop was in the ground it was appraised: an action of *indebitatus assumpsit* was brought. It was argued that the plaintiff could not recover, on the ground that the contract was within the Statute of Frauds. The plaintiff was held entitled to recover upon the special agreement made at the time of the appraisement, the action not being on an agreement with regard to lands. Had it not been for the appraisal and new agreement, the action would have failed.

In *Evans v. Roberts* (1826), 5 B. & C. 829, an agreement was made for the sale of a then growing crop of potatoes. It was held that this was a sale of goods, wares, and merchandise, different opinions being expressed by the different Judges dealing with the case. Bayley, J. (p. 831), took the view that the contract was "for the sale and delivery of things which, at the time of the delivery, should be goods and chattels," and suggested that, when the potatoes were at maturity and ceased to grow, they might then be regarded as having become chattels. Littledale, J., on the other hand, is more radical. He holds (p. 839) that "a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not within the 4th section of the Statute of Frauds.

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In *Jones v. Flint* (1839), 10 A. & E. 753, the earlier cases are discussed. There was an oral agreement under which the defendant agreed to buy a crop of corn, some stubble, and some potatoes growing upon the land. It was held that this was not within the 4th section, Denman, C.J., stating (p. 758): "If they had been ripe at the date of the contract, it may be considered now as quite settled that the contract would have been held to be a contract merely for the sale of goods and chattels. And, although they had still to derive nutriment from the land, yet a contract for the sale of them has been determined, from their original character, not to be on that account a contract for the sale of any interest in land."

In *Brantom v. Griffiths* (1876), 1 C.P.D. 349, it was held that growing crops are not goods and chattels within the Bills of Sale Act, Brett, J., summarising the law thus (p. 353): "It seems to me that the result of the authorities is that, though for certain purposes and under certain conditions they are goods and chattels, they are not so for all purposes, and therefore we must inquire further."

The result of all these cases is, I think, to establish that crops growing on land are part of the land, but that it is open to the owner of the land, at any rate when the crops have reached maturity, to treat them as chattels. The significance of that is, that here the landlord never agreed to treat this crop as chattels except upon the terms that he should be entitled to an undivided one-third of the crop when converted into chattels. All this is quite in accord with the law relating to emblements and awaygoing crops, the tenant's right to emblements and awaygoing crops depending upon an agreement, express or implied.

It is also in accordance with the common law under which growing crops could not be the subject of larceny.

Appeal dismissed.

[APPELLATE DIVISION.]

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POHLMAN V. HERALD PRINTING CO. OF HAMILTON LIMITED.

Libel—Newspaper—Libel and Slander Act, R.S.O. 1914, ch. 71, secs. 8, 15—Notice—Sufficiency—Misnomer of Defendants—Failure to Specify Statement Complained of—Statement of Name of Proprietor and Publisher—Dismissal of Action, notwithstanding Verdict for Plaintiff—Refusal to Direct New Trial.

In an action for a libel contained in a newspaper, it appeared that the plaintiff had served a notice, pursuant to sec. 8 of the Libel and Slander Act, R.S.O. 1914, ch. 71, addressed to the "Herald Publishing Company of Canada Limited," whereas the corporate name of the defendants was the "Herald Printing Company of Canada Limited."—

Held, by FALCONBRIDGE, C.J.K.B., that this was mere misnomer which could not mislead, and not a notice given to the wrong person.

Dingle v. World Newspaper Co. (1918), 43 O.L.R. 218, and *Redmond v. Stacey* (1918), 14 O.W.N. 73, distinguished.

The notice gave the date of the issue of the newspaper which contained the alleged libel, and indicated the particular article complained of by quoting its heading, and then said, "which article is largely untrue and libellous"—not specifying what parts of it were complained of:—

Held, upon appeal by the defendants from the judgment at the trial, upon the verdict of the jury, in favour of the plaintiff, that the notice did not comply with the requirement of sec. 8 that the statement complained of should be specified; and the action should be dismissed upon the defence of want of notice: it was not a case for a new trial, for reasonable men could not find that the notice specified the statement complained of.

MEREDITH, C.J.C.P., would not have considered the statement at the head of the editorials of the newspaper, "Published every week day by the Herald Publishing Company," a compliance with the provisions of sec. 15 of the Act. But that point was not open to the plaintiff in this Court: *Scown v. Herald Publishing Co.* (1918), 56 Can. S.C.R. 305.

AN action for libel. The defendants were the publishers of a newspaper in the city of Hamilton. The same plaintiff brought actions also against the publishers of two other newspapers, in the same city, for similar libels.

The three actions were tried together at Hamilton before FALCONBRIDGE, C.J.K.B., and a jury.

T. N. Phelan, for the plaintiff.

D. L. McCarthy, K.C., and *J. A. Soule*, for the defendants in this action.

D. L. McCarthy, K.C., and *C. W. Bell*, for the defendants the Spectator Printing Company.

S. F. Washington, K.C., for the defendants the Times Printing Company.

The jury found a verdict for the plaintiff for \$100 in each of the three actions.

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December 10, 1918. FALCONBRIDGE, C.J.K.B.:—The only point not covered or cured by the verdict of the jury is the question of the notice given by the plaintiff to the *Herald* defendants. That notice was given to the "Herald Publishing Company of Canada Limited," whereas the corporate name is the "Herald Printing Company of Canada Limited." I hold this to be mere misnomer, which could not mislead, and not a notice given to the wrong person, as in *Dingle v. World Newspaper Co.* (1918), 43 O.L.R. 218, 43 D.L.R. 463, and *Redmond v. Stacey* (1918), 14 O.W.N. 73.

But I do not give the plaintiff any leave to amend. And I give all the defendants leave to amend in terms of the notice of motion annexed to the record in the case against the *Herald* defendants.

Judgment for the plaintiff in each case for \$100 and costs on the Supreme Court scale.

The defendants the Herald Printing Company of Hamilton Limited appealed from the judgment of FALCONBRIDGE, C.J.K.B.

March 5, 1919. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

J. A. Soule, for the appellants. The notice was not sufficient under sec. 8 (1) of the Libel and Slander Act, R.S.O. 1914, ch. 71, in that it did not specify the statement complained of. There was not sufficient definiteness as to the objectionable matter to give the appellants an opportunity to retract: *Fletcher v. Nokes*, [1897] 1 Ch. 271. [MIDDLETON, J.:—Did not the appellants waive that objection by asking the plaintiff what he meant?] Surely not. The specifying had to be within the four corners of the notice, and could not be supplemented by what the plaintiff afterwards told the reporter: *Keen v. Millwall Dock Co.* (1882), 8 Q.B.D. 482; *Obernier v. Robertson* (1892), 14 P.R. 553. The Libel and Slander Act is remedial legislation and must be construed accordingly.

T. N. Phelan, for the plaintiff, respondent, contended that the notice sufficiently specified the complaint. It fulfilled the purpose for which it was intended. The appellants were not in any way prejudiced. The notice might be read as a complaint of every

statement in the paragraph. "Statement" meant the article. The Act was class legislation, and must be strongly construed against the class. The appellants had not complied with the requirements of sec. 15 of the Act.

Soule, in reply.

March 21. The judgment of the Court was read by MEREDITH, C.J.C.P.:—The single question involved in this appeal is, whether the defendants are entitled to have the plaintiff's judgment in this action, recovered at the trial and based upon the verdict of a jury, set aside, and the action now dismissed, under, and by reason of, the provisions of sec. 8 of the Libel and Slander Act.

The words of that section, in so far as they affect the question, are: "No action for libel contained in a newspaper shall lie unless the plaintiff has . . . given to the defendant notice in writing, specifying the statement complained of . . ."

The plaintiff gave notice in writing in these words:—

"Hamilton, July 25, 1918.

"The Herald Publishing Company of Hamilton Limited, 13-15 King Street West, Hamilton, Ont.

"Dear Sirs:—I beg to notify you that in your issue of the 'Hamilton Herald' bearing date the 26th day of April, 1918, you published an article bearing the heading:

"'Arrested for London

"'F. T. Pallman Will Face Forgery Charge There'

"which article is largely untrue and libellous.

"You will accept this notice as the notice required to be given under section 8, sub-section 1, of the Libel and Slander Act, being chapter 71, R.S.O. 1914."

The publication referred to in the notice was:—

(Heading as in the notice.)

"In arresting F. T. Pallman, of Milwaukee, believed, according to Chief Whatley, to be a German sympathiser, Detectives Shirley and Smith made an important capture here last night. Pallman, who was said to be of German nationality, was taken back to London this morning to face a charge of forgery, for which he is wanted by the police of that city. It is alleged by the local authorities that while in the Forest City Pallman wrote a letter, which, when opened by mistake by a mailing clerk in the

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employ of the company for which Pallman was working, was found to be strongly pro-German. He was promptly dismissed from the employ of that firm, and came to this city, where he has been under police surveillance for some time as a suspect."

It obviously contained several libellous statements if all the statements were untrue; but they were not; and the plaintiff does not, nor did he ever, complain of those which one might consider, even in wartime, the graver statements, as far as the plaintiff's character might be affected by them.

All that he has complained of, and recovered judgment for are those which relate to his nationality and matters connected with it.

How then can it be held that in his notice he "specified the statement complained of?" It is said that his notice may be read as a complaint of every statement contained in the whole of the paragraph published; but, apart from any other answer which might be made to that contention, the plaintiff's own words contained in the notice itself answer it: "which article is largely untrue and libellous," not altogether so.

The law requires us to treat the enactment as a remedial one; and we must do so, whether or not it be called class legislation, or be said that it was passed at the instance and through the influence of newspaper owners and publishers; and it is to be observed that in other like legislation as to giving notice, power to excuse want of notice and to aid faulty notice is sometimes given; none is given in this enactment; it is peremptory: "No action . . . shall lie."

Therefore, if the case is within the provisions of sec. 8, there is no means, of which I am aware, by which the faults of the notice can be cured or avoided; and this appeal should be allowed and the action should be dismissed, because it is not a case for a new trial. Reasonable men could not find that the notice specified the statement complained of, even if the words could be considered capable of such a meaning.

It was at first contended by Mr. Phelan that sec. 15 of the Act deprived the defendants of "the benefit of sec. 8."

The words of sec. 15 are:—

"(1) No defendant shall be entitled to the benefit of sections 8 and 14 of this Act unless the name of the proprietor and publisher

and address of publication are stated either at the head of the editorials or on the front page of the newspaper.

“(2) The production of a printed copy of a newspaper shall be *primâ facie* evidence of the publication of the printed copy, and of the truth of the statements mentioned in sub-section 1.”

But, upon the facts that the plaintiff's statement of claim alleged that the defendants were the owners and publishers of the newspaper in question, and that therefore it was not necessary that the defendants should prove such ownership and publishing, being called to his attention, and having regard to the ruling of the Supreme Court of Canada in the case of *Scown v. Herald Publishing Co.* (1918), 56 Can. S.C.R. 305, 40 D.L.R. 373, he eventually abandoned that contention.*

The only statement, at the head of the editorials of the newspaper in question, which could be treated as a compliance with the provisions of sec. 15 of the Act is: “Published every week day by the Herald Publishing Company.”

Off-hand I should have said: that is not a compliance with the provisions of the section; that there should be a statement that the company are the “proprietors and publishers,” in the very words of the enactment, or else in words plainly having the same meaning as “proprietors” and as “publishers:” and that telling the names of the publishers only could not be stating the names of the proprietors also, it would rather be concealing than stating their names.

But no such notion can now be given effect to, except, if at all, by or on the other side of the Supreme Court of Canada.

I would therefore allow this appeal, and direct that the action be dismissed upon the defence of want of notice only.

Appeal allowed.

*See also *Dingle v. World Newspaper Co. of Toronto* (1918), 57 Can. S.C.R. 573.

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[APPELLATE DIVISION.]

ROBSON v. WILSON.

Way—Right of Way—User for Long Period—Action for Trespass—Defences—Express Grant—Conveyance under Short Forms of Conveyances Act—Grant of Ways, Easements, and Appurtenances—Implied Grant—Lost Grant—Limitations Act—Unity of Possession of Dominant and Servient Tenements during 20-year Period before Action.

The defendants, the owners of the south-east quarter of a farm-lot, in defence to an action for trespass, asserted a right of way over the plaintiffs' land, the north-east quarter—the right to the use of an existing lane or roadway, well-marked upon the ground. This way had been in constant use by the defendants and their predecessors in title for half a century, and had been the only means of access to their farm ever since the land was occupied or used in any manner:—

Held, that the defendants' predecessor in title, by a conveyance to him of the south-east quarter in 1879, became lawfully entitled to the right of way claimed, by express grant, the conveyance being made pursuant to the Short Forms of Conveyances Act then in force, by reference to which the grant was a grant of "all . . . ways . . . easements . . . and appurtenances whatsoever" to the south-east quarter "belonging or in any wise appertaining, or with the same . . . used, occupied and enjoyed. . . ."

(2) The defendants relied also on an implied grant, but could gain nothing by it if they failed on the expressed grant: if the way did not come within the meaning of the words expressed, it could not come within the meaning of any that should be implied.

(3) If the defendants failed upon these two defences, the doctrine of a lost grant should be applied. Where it is found that there has been what is equivalent to adverse possession for more than 20 years it ought to be presumed to have originated lawfully, that is, in most cases, by a grant; and unity of possession, which would defeat a defence under the Limitations Act, might not defeat a claim as upon a lost grant.

Dalton v. Angus (1881), 6 App. Cas. 740, followed.

(4) If the defendants failed upon these three defences, they should succeed upon the defence of the Limitations Act. It was said that there was unity of possession of the two quarter-lots for several years within, and also before, 20 years next before the commencement of this action; but in truth there was no actual unity of possession at any time within 22 years next before the commencement of this action.

The effect of mere unity of possession during the 20 years immediately before action upon a defence under the Limitations Act, and the cases of *Onley v. Gardiner* (1838), 4 M. & W. 496, and *Battishill v. Reed* (1856), 18 C.B. 696, considered.

An appeal by the defendants from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiffs, in an action in the County Court of the County of York, in which the plaintiffs claimed an injunction restraining the defendants from trespassing upon the plaintiffs' land and cutting and destroying trees, damages, an account, and a declaration of the plaintiffs' rights. The defendants asserted a right of way over the plaintiffs' land—the right to the use of a lane.

The reasons for judgment of the learned County Court Judge were as follows:—

It is conceded by all parties that, while the owners of the west half of the lot have a right of way over the lane in question by express grant, there is no such grant in favour of the south-east quarter, owned by the defendants. A short abstract of the title is necessary to a proper understanding of the case:—

Henry Peterman acquired the south-east quarter in 1872 and the north-east quarter in 1875. Some time between 1875 and 1879 (it could not have been earlier than 1875), Henry Peterman, owning the 100 acres, established the lane along the southerly part of the north-east quarter, and put up the fences. The southerly fence of the lane is the boundary-line between the north-east and south-east quarters. Some years before, there was a travelled way or trail leading from the west half of the lot to the 7th concession, but this was an irregular and circuitous way, passing first through the south-east quarter, and then running north-easterly through the north-east quarter to the 7th concession. We are not concerned with it in this action. In 1879, Henry Peterman, who then owned the 100 acres, conveyed the south-east quarter to his son George, who, soon after, erected a house and barn thereon. The barn is close to the lane; the house is a little farther away. A gate was put in the lane-fence, and ever since that time access to and egress from the house to the 7th concession has been over this lane and through this gate.

It is contended by the defendants, first of all, that from the grant by Henry Peterman to his son George in 1879 of the south-east quarter, a grant must be implied of the right to use this lane.

There can be no doubt, I think, that, as a matter of law, if at the date of the conveyance from Henry Peterman to his son George the right of way in question was an apparent and continuous easement, which was necessary to the reasonable enjoyment of the south-east quarter, and which had been and was at the time of the grant used by the owner of the 100 acres for the benefit of the south-east quarter, then a grant of such easement will be implied: *Wheeldon v. Burrows* (1879), 12 Ch. D. 31; *McClellan v. Powassan Lumber Co.* (1907-09), 15 O.L.R. 67, 17 O.L.R. 32, and 42 Can. S.C.R. 249.

If the house and barn had been built before this grant, and the lane had been used before this as a means of access to the house

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and barn, I should have thought that the right of way was an apparent and continuous easement, and would pass. But in 1879 the condition was this. There was a straight lane running back from the 7th concession; the south boundary of the lane is the boundary between the north-east quarter and the south-east quarter; the lane itself being entirely upon the north-east quarter. It was made in the first instance for the benefit of the owner of the west half. To make a right of way an apparent and continuous easement, it is necessary to shew that it is more than a mere convenience. I think it must be shewn that, while there is no absolute necessity, there is some necessary dependence upon it, and I do not think this has been shewn in this case. Why should we infer or imply from the conveyance in 1879 that the grantor intended to give a right of way over the lane in question? The south-east quarter fronts upon the 7th concession; may we not with equal right assume that the grantor thought that, if buildings were erected, access to them would be obtained over another way from the 7th concession?

Finding, then, as I do, that the right of way over the lane in question was not an apparent and continuous easement enjoyed by the south-east quarter, the defendants' contention on this branch of the case fails.

Then it is contended, secondly, that the defendants have acquired a right of way by prescription. To obtain this they must shew that the right of way has been actually enjoyed by them or their predecessors in title, claiming a right of way, without interruption, for the full period of 20 years next before this action was brought. There is no doubt at all that during the last 20 years and longer the people who occupied the premises and lived in the house on the south-east quarter did use this lane as a means of getting to and from the house and in working the farm. But, unfortunately for the defendants, there has been unity of possession for most of that period. In 1890, George Peterman sold the south-east quarter to George Robson, and in 1898 Henry Peterman sold the north-east quarter to Samuel Robson. George Robson, up to the time of his death in 1896, worked the whole 100 acres, owning the south-east quarter, and renting the north-east quarter from Henry Peterman. The two places were worked together. In 1897, the south-east quarter was sold by the mortgagee to

George H. Wilson, a brother of the widow of George Robson. George H. Wilson allowed his sister to work the place, she paying what she could and keeping up the interest. From 1898 to 1908, the widow of George worked the south-east quarter, and also paid \$10 a year rent for the pasture in the rear of the north-east quarter and for the use of the lane. From 1908 to 1912, Edwin Robson, a son of George, rented the north-east quarter from his grandfather, Samuel Robson, and Edwin and his mother worked the 100 acres. In 1912, the widow and Edwin moved away, and the defendant Wilson took possession of the south-east quarter, and the plaintiff Robson the north-east quarter. So that, during at least 10 years of the time since George Robson acquired the south-east quarter in 1890, there was a unity of possession, though not of ownership. Whatever may be said as to the effect of unity of possession, as distinguished from unity of ownership, upon a claim by prescription at common law, as to which *vide* Gale on Easements, 9th ed., p. 182, it has been held with regard to a claim under the Prescription Act that mere unity of actual possession occurring at any time during the period is sufficient to prevent a claim from being established under the Act, even though the alleged dominant and servient tenements be held under different landlords: *Onley v. Gardiner* (1838), 4 M. & W. 496; *Battishill v. Reed* (1856), 18 C.B. 696; *Damper v. Bassett*, [1901] 2 Ch. 350.

Some doubt has been cast upon the first two of these decisions in *Ladyman v. Grave* (1871), L.R. 6 Ch. 763, at p. 768, and in *Ecclesiastical Commissioners for England v. Kino* (1880), 14 Ch. D. 213. But in *Damper v. Bassett*, which is later than any of them, Joyce, J., said (p. 354) that the decisions in question have not been overruled or expressly disapproved of, and should be followed. And the reason for this rule is not hard to find. During the unity of possession the servient owner can never complain of the use of the easment, in other words, cause an interruption in the user. In this case the owner or tenant of the south-east quarter had during the unity of possession the right to use the lane by virtue of being tenant of the north-east quarter, and during such period the owner of the north-east quarter could not complain or interrupt.

There will be judgment for the plaintiffs for a declaration and an injunction as prayed, and for \$15 damages for the cutting of the trees, and for the costs of the action.

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In parting with this case, I ought to add that, in view of the fact that this lane has been used as a means of access to the house and barn on the south-east quarter for so many years, and inasmuch as depriving the defendants of the use of it now will entail the making of another and separate entrance from the 7th concession, and in view of the fact that the plaintiffs are obliged to keep open the lane in question for the owners and occupants of the west half of the lot, it is to be hoped that the plaintiffs will allow the lane to be used as heretofore upon the defendants paying a reasonable rental for its use.

The judgment for the \$15 and injunction will be against the defendant Wilson alone.

March 7. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

J. Gilchrist, for the appellants, argued that from the grant by Henry Peterman to his son George of the south-east quarter in 1879 a grant must be implied of the right to use the lane in question: *McManus v. Cooke* (1887), 35 Ch. D. 681, at p. 693; *Duke of Devonshire v. Eglin* (1851), 14 Beav. 530; *Brown v. Alabaster* (1887), 37 Ch. D. 490; *Thomas v. Owen* (1887), 20 Q.B.D. 225; *Harris v. Smith* (1876), 40 U.C.R. 33, at p. 51; *Head v. Meara*, [1912] 1 I.R. 262, at p. 264; *Wheeldon v. Burrows*, 12 Ch. D. 31; "Cyc.," vol. 14, pp. 1154-1170; *Gale on Easements*, 9th ed., p. 453. Counsel also argued that the appellants had acquired a right by prescription.

A. J. Anderson, for the plaintiffs, respondents, contended that any prescriptive right had been interrupted and lost by unity of possession extending over the last 20 years: *Re Cockburn* (1896), 27 O.R. 450; *Innes v. Ferguson* (1894), 21 A.R. 323; *McLachlan v. Schlievert* (1911), 2 O.W.N. 649, 18 O.W.R. 457. He also argued that no grant should be implied, as the way was not one of necessity at the time of the grant: *Dodd v. Burchell* (1862), 1 H. & C. 113, at p. 122; *Holmes v. Goring* (1824), 2 Bing. 76; *Fitchett v. Mellow* (1897), 29 O.R. 6; *McClellan v. Powassan Lumber Co.*, 15 O.L.R. 67, 17 O.L.R. 32.

Gilchrist, in reply.

March 21. MEREDITH, C.J.C.P.:—The judgment appealed against deprives the defendants not only of their only means of

access from the front to the back of their farm, but also of their only means of access to their farm, upon which one of them resides, in any way; and does so notwithstanding the fact that such means of access have been in constant use by the defendants, and those through whom they acquired title to this land, for half a century, and have been the only means of such access ever since the land was occupied or used in any manner.

Such a user of a right of way necessarily carries with it very strong evidence of a legal right to it; and it must be an exceptional case in which it can lawfully be brought to an end, as that in question in this action is by the judgment appealed against. The lawyer, as well as the layman, is very properly opposed to a disturbance of such long-continued possession; the lawyers have gone so far as to write, and often enforce, the fiction of a lost grant, to prevent such a disturbance of such a possession. But there are exceptional cases; and we have now to consider whether this is a case in which the plaintiffs are entitled to the right which the judgment appealed against gives them notwithstanding such possession, in all the circumstances of the case.

The common defences to an action such as this are: that the defendant has been and is lawfully entitled to the right of way under: (1) an expressed grant; (2) an implied grant; (3) a lost grant; or (4) the Limitations Act: and all these defences are open to the defendants here, as they were in the County Court also.

But, before considering them, the material facts must be found, for really the case depends upon fact more than law: I mean that when the facts are found, and kept in mind, there should not be any great doubt or difficulty regarding the law which is applicable to them; and, although at the trial, and upon the argument of this appeal too, the whole story of all the lands involved, and all the devolutions of the titles to them, and many incidental circumstances, were fully discussed, the material facts are really few in number and little in controversy, or, at all events, easily found.

The owner of the west half of the whole lot has a right of way over the plaintiffs' land—which is the north-east quarter of the whole lot—to the concession-road in front of the lot, at its easterly limit. This right of way was made appurtenant to the west half of the lot by the will of Samuel Wallis, made in the year 1848.

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Henry Peterman became the owner of the defendants' land, the south-east quarter of the whole lot, in the year 1873; and he became the owner of the plaintiffs' land, the north-east quarter of the whole lot, in the year 1875.

Henry Peterman's son George became the owner of the land which is now the defendants', the south-east quarter lot, under a deed from his father to him, dated the 17th November, 1879.

It is not necessary to refer to any of the deeds or other writings by which title has come down to the plaintiffs and defendants respectively, further than to say that in none of them, until recent years, is any right of way described or referred to except in the general words attributed to the conveyances by such enactments as Short Forms of Conveyances Acts.

The locality of the right of way created by the will of 1848 was not defined in the will: and, the front of the lot being swampy, Henry Peterman, after acquiring title to the two quarter lots, and intending to bring them into use and cultivation, naturally, and very reasonably, proceeded to lay out a way, and construct a road, for the three-fold purposes of affording a means of access to his two quarter-lot farms, and a way which would well meet the obligation imposed upon the north-east quarter-lot by the will of 1848; and that way he made, almost necessarily, along the southerly limit of that quarter-lot, extending from the highway in front of the whole lot back to the west half of the lot. He could not make one-half on the south-east quarter because that would not satisfy the obligation of the will, which created the right of way over the north-east quarter only; and to serve both quarter-lots best it had to be made just where it is.

The way in question has been called a lane, but it is fairly entitled to a more imposing name: instead of being 10 or 12 feet in width, it was at once made two rods wide; it was fenced on both sides; a culvert was built in it; and, where necessary, it was in the first place made in the manner called "corduroy;" that is, it was constructed of timber logs laid crosswise as its foundation.

Much of the work done in making this permanent and efficient way was done by George Peterman, the son, working together with his father, to afford a good means of ingress and egress for the three-fold purposes I have mentioned.

Not only was there no other means of ingress and egress for the south-east quarter lot when George Peterman acquired title to it, but, as I have said, there never had been, and has never since been and is not now: and the same applies equally to the north-east quarter lot.

Under the Short Forms of Conveyances Act in force when the deed from father to son was made, the father granted: "all . . . ways . . . easements . . . and appurtenances whatsoever" to the south-east quarter-lot "belonging or in any wise appertaining, or with the same . . . used, occupied and enjoyed . . ." (R.S.O. 1877, ch. 102, sec. 4).

As the deed to the son was not made until 6 years after the father became owner of the south-east quarter-lot, and 4 years after he became owner of the other lot, and as there was no other way in or out of either, the way in question must have been pretty well constructed, and have been in use for several years, when the son became owner of the quarter-lot.

The facts of the case seem to me to bring the way in question well within the words of the grant which I have quoted; and therefore the first of these four defences is established.

As to the second of these—an implied grant—the defendants could gain nothing by it if they failed on that of the expressed grant: if the way does not come within the meaning of the words expressed, it cannot come within the meaning of any that should be implied.

But, if these two defences should fail, the third ought to succeed: the case is a strong one for applying the doctrine of a lost grant, without going nearly as far as the Courts of law in England have gone in applying it. The law upon the subject is discussed in the leading case, upon other points, of *Dalton v. Angus* (1881), 6 App. Cas. 740, where the rule is shewn to be—as it is generally understood to be—that where it is found that there has been what is equivalent to adverse possession for more than 20 years it ought to be presumed to have originated lawfully, that is, in most cases, in a grant: and that unity of possession, which would defeat a defence under the Statute of Limitations, might not defeat a claim under this defence: see *ib.* at p. 814, and *Aynsley v. Glover* (1875), L.R. 10 Ch. 283.

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The suggestion that, the case being one between father and son, the use and benefit which the son had of the way should be attributed to a mere license by the father—a mere matter of courtesy or favour—has no weight in my mind: I am not inclined to think that a father would convey less than a stranger in such a matter—a father selling to his son the farm in question without any other means of access to it; and a way which the son probably did more than the father to make. And, if that were not so, the suggestion would not account for the use of the way after the north-east quarter passed into the hands of others.

But, should the defendants fail on all of the first three of these defences, they should, in my opinion, succeed on the fourth. They should, admittedly, except for what is called a unity of possession of the two quarter-lots for several years within, and also before, 20 years next before the commencement of this action. What is relied upon is some kind of a tenancy of the north-east quarter-lot which the owner of the other quarter-lot is said to have had. There was, at no time, any unity of ownership: if there had been, a very different question would have arisen; the parties would hardly be engaged in this litigation if such were the case.

Under the demise from year to year, or other right in respect of the north-east quarter-lot, whatever may have been its exact character or duration, before or during the last 20 years, there was no extinguishment in law, or in fact, of the right of way: there was not any kind of cessation in fact of its use: it would be puerile to urge that the owner of the south-west quarter-lot ceased to make use of the way as one appurtenant to the lot he owned, and the only means of access to it, and exercised only the rights of a tenant or less than a tenant of the other quarter-lot whenever he or she passed over it between his or her own home on his or her own lot and the highway to which the private way led: to urge that he or she abandoned in fact his or her greatly needed rights in connection with this way as owner to enjoy them as tenant, a tenant such as he or she was: see *Hollins v. Verney* (1884), 13 Q.B.D. 304. Nor must it be forgotten that the owner of the north-east quarter-lot, even if he had also acquired ownership of the other quarter-lot, could not close the way, because of the right appurtenant to the west half of the lot. The learned County Court Judge seems to have thought that the cases of *Onley v. Gardiner*, 4 M. & W. 496,

and *Battishill v. Reed*, 18 C.B. 696, required that he should consider that mere unity of possession during the 20 years immediately before action defeated a defence under the Statute of Limitations. In that I am quite unable to agree. Whether, during the tenancy or tenancies or the exercise of any other right, the owner of the south-west quarter-lot or his tenant was or was not actually enjoying the right of way in question, claiming right thereto as such owner, must be a question of fact, for there can be no reasonable contention that as a matter of law he or she could not do so; there should be no such contention in the face of the obvious fact that he or she was so actually enjoying it.

It is difficult to gather from the report of the case of *Onley v. Gardiner* just what the facts were, but I should gather that there was no use of the way during the period of unity of possession. The statement of facts is that there was a use of the plaintiff's closes 40 years before action, but that user had long ceased: that down to about 15 years before action the three closes—plaintiff's and defendant's—had been occupied together: and that, from that period down to action brought, a way over the plaintiff's close from the defendant's close had been used for all purposes—the early use was for carrying hops and hop-poles only. It is difficult for me to see how a case decided upon such a state of facts can rule a case such as this, of such widely different facts, leading to widely different inferences and conclusions. In that case it seems that, upon its particular facts, no one could complain of any use which was made of any of the closes during the unity of possession. But how is it possible to assert that no action could have been brought by the owner of the south-west quarter as such owner for an unlawful use of the way as a way appurtenant to his own lot, and in that way only it was used; or indeed an action against him as tenant for being a party to such an encroachment upon and trespass to the demised land? And it may be added that, even in that case, leave was given to amend by pleading a right immemorially; or, as in these days, of a lost grant. And in the case of *Battishill v. Reed*, "there was an interval of ten years, when there was no user at all:" *per* Jervis, C.J., at p. 705.

But in truth there was no actual unity of possession at any time within 22 years next before the commencement of this action: all that is really asserted is that the widow Robson, who, some

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time after her husband's death, became tenant-at-will of her brother, one of the defendants, acquired from the owner of the north-easterly quarter-lot a right of pasturing in the "bush" on part of it, and some right in regard to the way in question: that right her son, who knows best, testified was a right of pasturing it as well as the bush, the two parts being open to one another so that one could not be pastured without the animals going upon the other; and this seems to me to be manifestly so, because there was no power to let more than that, because of the right of way appurtenant to the west half of the lot, not to mention that it was and always had been the only means of access to the two easterly quarter-lots: so that I must again say that it is puerile to contend that the owner of the freehold let this way to any tenant with the right among other things to plough it up and put in crops: to contend that the woman took anything but a right of pasturing in the "lane" and in the "bush" connected with it, a right which, in the climate of this Province, extends over a period of about 6 months only in each year: and, as to the 4 years when the quarter-lot was really let, it was let to Mrs. Robson's son, not to the owner of the other quarter or to his tenant: so that there was not in fact any unity of possession at any time within 22 years next before this action was brought.

Therefore, if the defendants should fail upon the other three defences, they should succeed upon the fourth: but they should succeed, in my opinion, upon the first, which excludes the second and fourth, and also the third.

I would allow the appeal and dismiss the action upon its main branch, involving the question of right of way: on the minor branch of it, trespass in cutting down and carrying away some trees, the plaintiffs have judgment for \$10 damages, and that judgment is not appealed against, and therefore must stand: the defendants should have their costs of this appeal and the general costs of the action, and no order should be made as to costs of the minor branch, if there be any separate costs applicable to it.

BRITTON, J., agreed with MEREDITH, C.J.C.P.

LATCHFORD and MIDDLETON, JJ., agreed in the result.

Appeal allowed.

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Deed—Construction—Conveyance of Land under Short Forms of Conveyances Act, C.S.U.C. ch. 92—Release Clause—Effect of—Release of Interest under Executory Devise over in Will of Father of Grantor—Special Proviso in Deed—Application and Effect of—Trust—Evidence—Statute of Frauds.

A father devised to his son E. the east half of his farm (subject to the payment of legacies to daughters) and to his son J. the west half (subject to the payment of legacies to daughters)—“And if either of my two sons E. and J. should die without heirs direct then his portion shall go to the other his heirs and assigns.” These devises were also subject to a life-estate devised to the testator’s wife. The testator died in 1866; his wife died in 1884. In 1873 J. by deed quit-claimed to E. all his (J.’s) right, title, interest, claim, and demand in and to the west half. By a conveyance, made in pursuance of the Short Forms of Conveyances Act, C.S.U.C. ch. 92, E., in 1877, conveyed the west half back to J., for an expressed consideration of \$2,000. This conveyance contained the usual release clause, and the following special proviso: “Subject also to the terms conditions and charges and legacies concerning the same expressed in the will”—that is, the will of the father. In 1885 the legacies were paid and the lands released therefrom. J. died in 1918, unmarried, and by his will devised the west half to the defendant. Two days after J.’s death, E., claiming to be entitled under the devise over to him in the will of his father, assumed to convey the west half to the plaintiff:—

Held, that the words of the release clause in the conveyance of 1877, as expanded in the Short Forms Act, were ample to release to J. all and every interest which E. then had or might thereafter attain in the west half, and that the words of the special proviso should be treated as applicable to the life-estate of the widow (she being then still alive) and to the charges and legacies in favour of the daughters, which were then in force and unpaid; and therefore J. acquired, by virtue of the deed from E., a fee simple in the west half, free from the effect of the devise over to E. in the event of the death of J. “without heirs direct;” and the defendant, under the devise from J., was entitled to possession of the west half.

The Statute of Frauds precluded the establishment of a trust in E. and a mere reconveyance from him to J.; and, if oral evidence was admissible for such a purpose, the evidence adduced failed to prove a trust.

AN action to recover possession of the west half of the south half of lot No. 14 in the 1st concession of the township of Townsend, in the county of Norfolk.

The action was tried by MASTEN, J., without a jury, at Simcoe.

W. E. Kelly, K.C., for the plaintiff.

T. J. Agar, for the defendant.

March 24. MASTEN, J.:—Down to the year 1866, James Birdsill, the grandfather of the plaintiff and of the defendant James D. Birdsill, was the owner in fee simple of the whole of the south half of the lot No. 14 above mentioned, containing 100

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acres. He died in or about the year 1866, and by his last will provided as follows:—

“I give devise and bequeath unto my son Edward Birdsill the east half of the south half of lot number 14 in the 1st concession of the township of Townsend in the county of Norfolk and Province of Canada together with all the appurtenances thereunto belonging to him his heirs and assigns forever after the death of my said wife Ellen Birdsill on conditions and upon the expressed understanding that he the said Edward Birdsill shall well and truly pay or cause to be well and truly paid unto my before mentioned children namely Isaac Mary Ann Lovina each \$100 being the amount heretofore set to them to be paid within one year after the death of my said wife.

“I give devise and bequeath unto my son James Birdsill the west half of the south half of lot number 14 in the 1st concession of said township of Townsend together with the appurtenances thereunto belonging to him his heirs and assigns forever after the death of my said wife on condition and upon the expressed understanding that the said James Birdsill shall well and truly pay or cause to be well and truly paid unto my before mentioned children viz. Sally Ann Phebe Ellen and Charity each the sum of \$25 being their apportionment as mentioned heretofore to be paid within one year after the death of my said wife.

“And if either of my two sons Edward or James should die without heirs direct then his portion shall go to the other and his heirs and assigns. . . .”

By an earlier clause of his will he devised to his wife, Ellen Birdsill, an estate for life in both parcels.

Upon a proper construction of this will, I think there was devised to the widow a life-estate in the lands in question with remainder either in fee simple or fee tail to James Birdsill the younger, subject to an executory devise in favour of Edward, if James should die without heirs direct.

That being the situation at the time of the death of James Birdsill the elder, we come down to the year 1873, when, by deed dated the 4th October, 1873, and registered on the 7th October, 1873, James Birdsill the younger, for an expressed consideration of \$2,000, quit-claimed to his brother Edward Birdsill all his right, title, interest, claim, and demand in the lands in question, being the west half of the south half of lot 14.

Edward held the title from 1873 to 1877. As regards possession during that period, the evidence shews that the mother was still alive (she died in the year 1884), and that Edward and his wife were living on the south-west quarter (that is, the land in question), while James and his mother and sisters were living at the home-
stead on the south-east quarter. No change in possession appears to have taken place in consequence of the conveyance from James to Edward or the conveyance from Edward to James.

By a conveyance, made in pursuance of the Act respecting Short Forms of Conveyances, dated the 6th March, 1877, and registered on the 11th December, 1884, Edward Birdsill (his wife joining to bar dower) granted and conveyed the same lands back to James Birdsill the younger, for an expressed consideration of \$2,000.

A release under seal, dated the 23rd January, 1885, after reciting the death of the life-tenant and the payment to the several releasors of the legacies to them bequeathed, discharges the lands in question from all claims of legatees under the will.

James Birdsill the younger died on the 19th June, 1918, unmarried, and by his will devised the lands in question to the defendant, James D. Birdsill, subject to a legacy of \$2,000 in favour of Charity Allen.

On the 21st June, 1918, Edward Birdsill, claiming to be entitled under the executory devise in the will of his father, viz., "And if either of my two sons Edward or James should die without heirs direct then his portion shall go to the other and his heirs and assigns," assumed to convey to the plaintiff, Vernon Birdsill, the lands in question.

The present contest arises between the two brothers, Vernon claiming under the deed from his father, Edward, and James D. Birdsill claiming under the will of his uncle, James. The action came on for trial before me without a jury.

Out of regard for the direction made by the Court when this question came up for hearing in the Weekly Court, I admitted, subject to objection, much evidence regarding the acts and statements of the parties at and subsequent to the date of the occurrences in question. On consideration I find, except in so far as the evidence tends to establish or rebut an intention on the part of James the younger to convey the lands to Edward in 1873, for

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the purpose of defeating and defrauding a creditor's claim, or establishes the conveyance of a beneficial interest in the lands, such evidence is not admissible.

The question, in my opinion, turns upon the legal effect of the conveyances from James to Edward in 1873 and from Edward to James on the 6th March, 1877. When James executed a quitclaim of the lands in question to Edward, the whole remainder after the mother's life-estate became vested in Edward, that is to say, Edward then held by conveyance from James the remainder in fee simple or fee tail which had been devised to James, and he was himself entitled directly under the will to the benefit of the executory devise to him (Edward) in case James died without heirs direct. Both these interests were held by Edward from 1873 to 1877. It is immaterial to determine whether there was a technical merger.

Then in 1877, when Edward conveyed to James, it is to be observed that the conveyance is made in pursuance of the Act respecting Short Forms of Conveyances, and purports, so far as the granting words of the deed are concerned, to convey to James the fee simple in the lands. The conveyance contains the usual short form covenants, and among them the following: "And the said party of the first part releases to the said party of the third part all his claims upon the said lands." The expansion of these words in column 2 of the Short Forms of Conveyances Act in force in March, 1877 (C.S.U.C. ch. 92) is as follows: "And the said releasor hath released, remised, and forever quitted claim, and by these presents doth release, remise, and forever quit claim, unto the said releasee, his heirs and assigns, all and all manner of right, title, interest, claim, and demand whatsoever, both at law and in equity, into and out of the said lands and premises hereby granted, or intended so to be, and every part and parcel thereof, so as that neither he nor his heirs, executors, administrators, or assigns, shall nor may, at any time hereafter, have, claim, pretend to, challenge or demand the said lands and premises, or any part thereof, in any manner howsoever, but the said releasee, his heirs and assigns, and the same lands and premises shall from henceforth forever hereafter be exonerated and discharged of and from all claims and demands whatsoever which the said releasor might or could have upon him in respect of the said lands, or upon the said lands."

These words are ample to release to James Birdsill the younger all and every interest which Edward then had or might thereafter acquire in the lands, unless the special proviso contained in the deed makes a difference. The words of this special proviso are as follows: "Subject also to the terms conditions and charges and legacies concerning the same expressed in the last will and testament of James Birdsill late of the said township of Townsend yeoman deceased which said will bears date the 28th day of November A.D. 1865."

It is to be observed that at this time the estate for life of the mother in the lands in question was in full force and so remained for 7 years thereafter; also that the legacies charged upon the lands in question in favour of Sally Ann, Phœbe, Ellen, and Charity of \$25 each, had not yet become payable and had not yet been paid.

A consideration of these surrounding circumstances leads me to the conclusion that full effect can be given to the words of the deed as just quoted by treating them as applicable to the life-estate of the widow and to the charges and legacies in favour of the sisters. I think that was the real intention of the parties, and that the effect of the conveyance is to transfer to James Birdsill the younger every interest which inhered in Edward, including the potential rights which Edward possessed under the executory devise in case James the younger should die without issue, but subject to the life-estate of the mother and to the legacies in favour of the sisters.

Without determining whether the deed from James to Edward was made for fraudulent purposes or was made in pursuance of an agreement for an exchange of lots, or whether an actual payment of money was made or not, the deed from Edward back to James must, in my opinion, stand on its own bottom, and it conveys all Edward's interest, both actual and potential, in the lands in question.

The Statute of Frauds precludes the establishment of a trust in Edward and a mere reconveyance from him to James. And, if oral evidence were admissible for such a purpose, the evidence here adduced fails, in my opinion, to prove a trust.

The result is, that James Birdsill the younger, in my opinion, acquired, by virtue of the deed from Edward, a fee simple in the

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lands, free from the proviso in the will of James Birdsill the elder, whereby, in case of the death of James without heirs, Edward became entitled to the lands in question. James the younger thereby took a complete title in fee simple without any conditions attached except the payment of the \$25 legacies to the sisters and subject to the mother's life-estate. The mother having died, and the legacies having been paid, James Birdsill the younger was, at the time of his death, entitled to the lands in fee simple, and his will purporting to devise the same to the defendant as set forth in the record is a valid and effective will.

The plaintiff's action is, therefore, dismissed with costs.

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PERE MARQUETTE R.W. CO. v. MUELLER MANUFACTURING CO.
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Railway—Carriage of Goods—Freight Rates—Tariff Approved by Railway Board—Railway Act, R.S.C. 1906, ch. 37, sec. 314 (7 & 8 Edw. VII. ch. 61, sec. 11)—Nature of Goods Innocently Misdescribed in Bill of Lading—Rate Fixed according to True Description and Classification.

Section 314 of the Railway Act, R.S.C. 1906, ch. 37 (as enacted by (1908) 7 & 8 Edw. VII. ch. 61, sec. 11), prevents a carrier collecting tolls other than those provided for in a tariff authorised and approved of by the Railway Board.

A common carrier cannot collect freight rates on "metal scrap" at a rate different from the rate established by the Railway Board tariff, simply because the shipper at the time of the shipment innocently misrepresented what was in fact "metal scrap" to be "copper ingots."

Both by the statute and the contract of the parties, the rate on the goods carried must be fixed by their actual and proper description and classification, rather than by their description in the bill of lading. It being admitted that the goods actually carried would have been properly described and classified as "scrap metal," and that the description used in the bill of lading, "copper ingots," was a misdescription, the plaintiffs' claim for the lawful tariff rate must be limited to the lawful tariff rate on "scrap metal," and, that rate having been paid before action brought, the action failed.

Review of the authorities.

Judgment of MEREDITH, C.J.C.P., reversed.

AN action for a declaration as to the proper rate chargeable for the carriage of goods by the plaintiffs for the defendants, and for payment accordingly.

December 3, 1918. The action was tried by MEREDITH, C.J.C.P., without a jury, at Sarnia.

R. L. Brackin, for the plaintiffs.

A. Weir and *A. I. McKinley*, for the defendants.

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MEREDITH, C.J.C.P. (at the conclusion of the hearing):—This case is by no means as complicated as the number of exhibits put in, and the amount of testimony taken, at the trial, might indicate. It is all in a very narrow compass.

The question raised is: what freight rate should be paid for the carriage of the brass or copper, and other metals combined, from San Francisco to Sarnia, which the defendants received from the plaintiffs, as carriers of them. The rate for carriage, in such cases, is not something which depends upon the parties to the contract alone; the laws of this country, and those of the United States of America, have something to say upon the subject. Those laws prevent discrimination and prohibit the companies from exacting anything except that which has been approved by the proper officer appointed by the Government. The authorised tariffs prevail, and they provide for the "classification" of goods.

Goods of one character are carried at a higher rate than those of another class. It depends perhaps mainly upon the quality—whether the goods are more or less valuable—but, however that may be, what is binding upon every one is the classification and the rates authorised.

The difficulty in this case is to decide what classification and consequent rate is applicable to the goods in question. The testimony upon this question is not sufficient to satisfy my mind. Therefore, the case must go to the proper officer to ascertain and state what the rate applicable is—unless the parties are able to come to an agreement as to it. There ought to be no occasion for a reference, the parties ought to be able to agree on that point. Once the character of these goods is ascertained, and the law applicable to them is determined, it ought to be easy to find out conclusively, from a proper railway officer or railway board, what the rate is, and then judgment could be entered accordingly.

If the rate should not be ascertained, by agreement between the parties as suggested during the argument, or from a proper officer—though I am quite sure it could and should be—then there must be a reference as I have mentioned; which means more litigation and more costs.

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I must now clear the way for ascertaining what the rate is, and, for that purpose, I find: that the goods in question are not ingot copper or ingot brass, though, until broken, having only that appearance, nor are they what might properly be described as either scrap brass or scrap copper; though their value is pretty much that of the same weight of such scrap. But they are not scrap brass or scrap copper; nor could they be truly described as such. In the way that the case presents itself to my mind, it is not material how the goods might best in a word or two be described, that which they are said to be is largely Japanese or Chinese money tokens in casings, having the appearance of ingots.

The defendants, for their own purpose, chose to describe the goods as copper ingots, and with that description and representation delivered them to the railway carriers, to be carried with that care which should be given to goods of that character. Having done that, I hold, the defendants are bound to pay the proper rate applicable to such goods—copper ingots. It cannot be under that description possible that they might ship the goods, either by mistake, or designedly so as to get the benefit of the care given to the carriage of such goods, and then turn around and say they are goods of much less value—"scrap"—and should be carried at the much lower rate. I cannot think that reasonable men would enter into a contract of that kind, and I am sure these railway companies would not. They generally take care of themselves very well and make no mistakes of that character; nor would Government officers, if they had the power, impose it upon them: it is too plainly unreasonable and unfair. I firmly decline to make any ruling that would have the effect of enabling any shipper, by his own fraud, or the fraud of any one else, or his own mistake, to obtain and enforce a "discrimination" in his own favour. No precedent can be found for it, and none shall be made by me.

But it is contended that the carriers themselves have expressly declared in their contract that, no matter what may be said or done, by the owner of the goods, the freight is to be paid only according to the classification of the goods as they, in character, actually are: that the true character of the goods is alone to determine the rate. That is Mr. Weir's contention, and he supports it by reading a clause of the bill of lading, which is in the e words:—

"The owner or consignee shall pay the freight and all other lawful charges accruing on said goods, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the goods shipped are not those described in the bill of lading, the freight charges must be paid upon the goods actually shipped, with any additional penalties lawfully payable thereon."

I am quite in accord with Mr. Brackin in his contention that that is a provision in favour of the carrier and not against him: that it could not have been intended to apply to a case of this kind. The full rate and the additional penalties are imposed on the shipper. It is aimed against him only. It cannot have been intended that a shipper might describe goods falsely, so that they might have special care and attention, which if truly described they would not get, and then, when the time comes to pay the freight bill, be allowed to pay upon the basis of the lower classification, and for carriage which might have been of an entirely different character if the goods had been truly described. It could hardly be contended that, if their goods were shipped and carried as go'd ingots, the defendants need pay only the freight rate for scrap brass or copper. The principle is the same, when shipped as copper ingots: the difference is only in measure of the carriage cost.

I hold and find: that the freight charges should be paid according to the classification applicable to the character of goods as stated by the defendants in their telegram, and as delivered to and accepted by the railway company, and accordingly carried by them from San Francisco to Sarnia.

Nothing was said by Mr. Weir, in his argument, as to the payment which the defendants made. I do not see how anything could be said, of any consequence, in regard to it. The payment was made to the local agent of the plaintiffs, at Sarnia, and he endorsed a cheque which contained words indicating that the cheque effected a payment in full of the freight charges. It is always open to one who gives a receipt for a payment, to prove a mistake in it. In this case, even if the payment had been made to some one of higher authority than the local agent, I cannot understand why an error of any character could not be corrected. And the endorsement was not even a receipt. The payee may not actually accept its terms; in which case, the position of the

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parties seems to be this: the drawer of the cheque may sue to recover his money, and he who cashed it may counterclaim for the full amount of his demand.

My conclusion upon the whole case is this: that the defendants must pay freight at the proper rate applicable to the goods as described by them—"copper ingots." If the parties cannot agree upon what that rate is, it must be referred to the proper local officer at Sarnia to ascertain it. The plaintiffs are entitled to their costs of this action upon the scale applicable to the case, and subject to set-off, if any, under the Rules.

The defendants appealed from the judgment of MEREDITH, C.J.C.P.; and the plaintiffs, by way of cross-appeal, asked that the Court should dispense with a reference and itself find the amount to which the plaintiffs were entitled.

February 28. The appeal and cross-appeal were heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

A. Weir and *A. I. McKinley*, for the defendants, referred to *Kirk v. Missouri Kansas and Texas R.W. Co.* (1916), 39 Interstate Commerce Commission Reports 755, 756, as laying down the correct principle to be followed in such cases, that "the character of a shipment and not the accidents of billing determines its nature." Here the defendants, by an innocent mistake, had described the goods shipped as copper ingots, when they were, in reality, scrap metal. The defendants were willing to pay the proper rate applicable to goods of that nature, and should not be required to pay more.

R. L. Brackin, for the plaintiffs, argued that his case could be rested on the law of estoppel, as the defendants should be bound by the description of the goods in the bill of lading, and the plaintiffs were entitled to the rate fixed for such goods by the tariff, which was admitted by both parties to be duly authorised. He referred to *Beale & Wyman on Railroad Rate Regulation*, 2nd ed., secs. 504-524; *MacMurchy and Denison's Railway Law of Canada*, 2nd ed., p. 635.

Weir, in reply.

March 28. The judgment of the Court was read by FERGUSON, J.A.:—An appeal by the defendants from the judgment of the

Chief Justice of the Common Pleas, dated the 3rd December, 1918, declaring the plaintiffs entitled to be paid the tariff rate for the carriage of copper ingots, although the goods carried were not copper ingots, but were in fact scrap metal, and referring it to the Local Master at Sarnia to find the lawful tariff rate on copper ingots.

The plaintiffs cross-appeal, asking that the Court dispense with the reference and do now find the amount to which the plaintiffs are entitled, by reference to the printed tariff put in.

In their pleading the plaintiffs state their claim as follows:—

“1. The plaintiff is a common carrier operating a line of railway in the United States of America and in the Province of Ontario.

“2. During the months of January and March in the year 1917 the defendant received at Sarnia, Ontario, over the line of the railway of the plaintiff, several shipments of brass, upon which shipments the defendant was liable to pay the freight charges to the plaintiff.

“3. The proper freight tariff applicable to such shipments required the plaintiff to charge against and collect from the defendant the rate applicable upon brass, but the defendant refuses to pay freight except at the rate applicable upon scrap metal, the result being that, while the total freight upon such shipments charged at the proper tariff rate was \$10,292.81, the defendant has paid to the plaintiff the sum of \$3,600.79, the amount claimed by the defendant to be the proper freight charges, leaving a balance of freight charges in respect of the said shipments owing by the defendant to the plaintiff of \$6,692.02.”

The dispute between the parties is as to whether the rate of freight is to be fixed by the description in the bill or by the true description of the commodity carried. The goods were shipped and described in the bill as copper ingots, but were in truth scrap metal. The authorised tariff rate on copper ingots is admitted to be \$2.20 per hundred, and on scrap metal 76.8 cents, making a difference on the shipments of \$6,692.02.

In December, 1916, the defendants entered into contracts with Paul Wenger & Company, of New York, to purchase from them “Brass ingots, analysis not guaranteed, about same as sample; delivery ex-steamer, San Francisco, California; shipment from

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Japan by steamer during December, 1916, or January, 1917; terms, net cash against documents."

The defendants, on presentation of documents, paid the purchase-price, and instructed that the goods be shipped from San Francisco, California, to Sarnia, and, believing them to be ingots according to their contract of purchase, directed that the goods be classified and shipped as copper ingots. The defendants paid to the plaintiffs for carrying charges the tolls that would be payable on scrap metal.

The plaintiffs were not satisfied to accept this sum in full satisfaction, and in this action claim that, because the defendants classified the goods as copper ingots, they must pay on the basis of their own description and classification.

The parties agreed before us that the bill of lading and the printed tariff put in as evidence were the bill and tariff authorised, approved, and adopted by the Interstate Commerce Commission, U.S.A., and the Canadian Railway Board, and that the law of the United States governing tariffs and contracts of common carriers was the same as that of Canada, and that the provisions of the Canadian Railway Act were applicable to the contract between the parties.

As I see it, the point in this case is, can a common carrier collect freight charges on metal scrap at a rate different from the rate established by the Railway Board tariff, simply because the shipper at the time of the shipment innocently misrepresented what was in fact metal scrap to be copper ingots?

At the trial the case appears to have been dealt with on the meaning of the express provisions of the bill of lading and the conditions thereon endorsed.

I am of the opinion that sec. 314 of the Railway Act, R.S.C. 1906, ch. 37 (as enacted by (1908) 7 & 8 Edw. VII. ch. 61, sec. 11), prevents a carrier collecting tolls other than those provided for in a tariff authorised and approved of by the Railway Board.

Counsel for the plaintiffs argued that their claim did not contravene that section, as they were claiming the authorised rate on copper ingots, and that the rate is governed by the description in the bill.

The defendants say that the description in the bill does not affect or govern the rate; that the rate must be fixed and deter-

mined by the proper description of the goods carried; that sec. 315 not only limits the carrier and the shipper, but limits the Railway Board's right to fixing tolls by reference to the goods carried, and not by reference to what they are represented or agreed to be.*

No Canadian case was cited to us—and I have not been able to find any—dealing directly with the point. In *Watson v. Canadian Pacific R.W. Co.* (1914), 32 O.L.R. 137, 20 D.L.R. 472,

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*Sections 314 (as enacted by sec. 11 of the Act of 1908) and 315 (as in the original Act) are as follows:—

314. The company, or the directors of the company, by by-law, or any officer of the company thereunto authorised by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged in respect of the railway owned or operated by the company, and may specify the persons to whom, the place where and the manner in which, such tolls shall be paid.

2. The tolls may be either for the whole or for any particular portion of the railway.

3. All such by-laws shall be submitted to and approved by the Board.

4. The Board may approve such by-laws in whole or in part, or change, alter or vary any of the provisions therein.

5. No tolls shall be charged by the company or by any person in respect of a railway or any traffic thereon until a by-law authorising the preparation and issue of tariffs of such tolls has been approved by the Board, nor, unless otherwise authorised by this Act, until a tariff of such tolls has been filed with, and, where such approval is required under this Act, approved by, the Board; nor shall any tolls be charged under any tariff or portion thereof disallowed by the Board; nor shall the company charge, levy or collect any toll or money for any service as a common carrier except under the provisions of this Act.

6. The Board may, with respect to any tariff of tolls, other than the passenger and freight tariffs in this Act hereinafter mentioned, make regulations fixing and determining the time when, the places where, and the manner in which, such tariffs shall be filed, published and kept open for public inspection.

315. All such tolls shall always, under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in or upon the like kind of cars, passing over the same portion of the line of railway, be charged equally to all persons and at the same rate, whether by weight, mileage or otherwise.

2. No reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular person or company travelling upon or using the railway.

3. The tolls for larger quantities, greater numbers, or longer distances may be proportionately less than the tolls for smaller quantities or numbers, or shorter distances, if such tolls are, under substantially similar circumstances, charged equally to all persons.

4. No toll shall be charged which unjustly discriminates between different localities.

5. The Board shall not approve or allow any toll, which for the like description of goods, or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line, is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the Board is satisfied that owing to competition, it is expedient to allow such toll.

6. The Board may declare that any places are competitive points within the meaning of this Act.

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it seems to me to have been assumed that the only rate recoverable was that authorised on the goods when properly described; the question decided in that case was whether or not sec. 341 provided an exception to the general rule.

In *Urquhart v. Canadian Pacific R.W. Co.* (1909), 12 Can. Ry. Cas. 500, 2 Alta. L.R. 280, a claim by a shipper for damages suffered by reason of the railway company misquoting the rate, Stuart, J., delivering the judgment of the Alberta Court of Appeal (12 Can. Ry. Cas. at pp. 505-6), said:—

"It is conceded that in view of the provisions of the Railway Act no action would lie upon the contract of affreightment, and that it is impossible to consider what passed between Urquhart and the agent of the defendant company as a contract to carry the potatoes at 32½ cents per hundred pounds. Inasmuch as the true rate according to the authorised tariff then in force was 58 cents, and as the imposition of any different rate, either higher or lower, is forbidden by the Act, such a contract would clearly be illegal and void."

There are a number of cases in the United States, and they will be found collected in Lust & Merriam's Digest, pp. 564, 803 to 808, and in 10 Corpus Juris, pp. 509 to 514.

"Neither misquotation, contract, or decision of a Court on the reasonableness thereof can alter the legal rate:" *Blinn Lumber Co. v. Southern Pacific Co.* (1910), 18 Interstate Commerce Commission Reports 430, 433. (The quotation is from Lust & Merriam's Digest, p. 808.)

"No excuse, which operates as an evasion of the rate, has any standing as matter of law in defence of a proved violation of such rate. Mistake, inadvertence, honest agreement and good faith are alike unavailing:" *New York New Haven and Hartford R.R. Co. v. York and Whitney Co.* (1913), 215 Mass. 36, at p. 39.

"Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper:" *Kansas City Southern R.W. Co. v. Carl* (1913), 227 U.S. 639, 653.

The Canadian Railway Board held that it could not even consider a contract between the shipper and the carrier as a tariff condition in fixing rates. But the Supreme Court of Canada, in *Montreal Park and Island R.W. Co. v. City of Montreal* (1910), 43 Can. S.C.R. 256, and in *Canadian Pacific R.W. Co. v. Regina*

Board of Trade (1911), 13 Can. Ry. Cas. 203, 45 Can. S.C.R. 321, indicated that they thought that the Board had jurisdiction to consider such contract as a tariff condition when they were fixing the rate, but that the rate could not be fixed by act or contract of the parties.

On reference to the report of *Canadian Pacific R.W. Co. v. Regina Board of Trade*, 13 Can. Ry. Cas. at p. 213, it will be seen that the Board said "that it was not the intention of Parliament in passing section 315 of the Railway Act to permit railway companies to create different circumstances and conditions by entering into a contract with some one and so defeat the intention of the section, and that the circumstances and conditions which, if not substantially similar, may justify different treatment of different localities, must be traffic circumstances or traffic conditions, not circumstances and conditions which may be artificially created by contract."

These two latter cases are not directly in point, but they seem to me to indicate the view of the Board and the Supreme Court of Canada in reference to the rights of the carrier and the shipper, and to bear out the view expressed in the American cases.

Endorsed on the bill is a condition reading in part as follows:—

"If upon inspection it is ascertained that the goods shipped are not those described in the bill of lading, the freight charges must be paid upon the goods actually shipped."

The defendants in this case claimed that that condition applied in their favour, but the learned trial Judge said:—

"I am quite in accord with Mr. Brackin in his contention that that is a provision in favour of the carrier and not against him: that it could not have been intended to apply to a case of this kind. It cannot have been intended that a shipper might describe, goods falsely so that they might have especial care and attention . . . and then, when the time comes to pay . . . be allowed to pay upon the basis of the lower classification."

I think it is erroneous to apply to this bill of lading the same rules of construction as are applied to agreements made between individuals unrestricted in their right to contract. Section 340 of the Railway Act, R.S.C. 1906, ch. 37, gives the Board power to regulate and prescribe the terms and conditions under which

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any traffic may be carried by the company; and, it being admitted that this bill is on a form prescribed by a Board having the duty to guard and protect, not only the rights of the parties to the contract, but the rights and interests of the public, we should, I think, in interpreting it, look at it differently from a contract between parties enjoying perfect freedom of action, and should construe it so as to interpret it in accordance with the true intent and meaning of the Board that prescribed it, rather than in accordance with what should be presumed to be the intention of the contracting parties, who had no power to alter its terms.

Being of opinion that the true intent and purpose of the Railway Act and of the Board is to fix the rate by reference to the goods actually carried, rather than by reference to the description thereof in the bill of lading, and that the effect of the Act is to prevent the carrier collecting any rate other than that authorised in manner provided for in the Act, I think the contract should, if possible, be given a construction which will best give effect to the Act and the intent and purpose of the Board.

I do not consider it necessary to deal with the hypothetical case stated by the learned trial Judge, for this is not a case of intentional misdescription, where the defendant is seeking to set up and take the benefit of his own fraud, or a case calling upon us to consider whether or not a defendant can set up his own fraud as an answer to a claim. It may be that the plaintiffs have a cause of action against the defendants for deceit or negligence, but that claim is not before us in this action. The claim here is for the lawful tariff charges on the goods carried, as fixed by the contract of the parties, read in the light of the provisions of the Railway Act.

I would, for these reasons, conclude that, both by the statute and the contract of the parties, the rate on the goods carried must be fixed by their actual and proper description and classification, rather than by their description in the bill of lading. It being admitted that the goods actually carried would have been properly described and classified as "scrap metal," and that the description used in the bill of lading, "copper ingots," is a misdescription, it follows that the plaintiffs' claim for the lawful tariff rate must be limited to the lawful tariff rate on "scrap metal;" and, that rate

having been paid before action brought, the plaintiffs' action fails.

I would allow the appeal with costs, and dismiss the cross-appeal and action with costs.

Appeal allowed; cross-appeal dismissed.

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RE STANDARD LIFE ASSURANCE CO. AND KRAFT.

Insurance (Life)—Insurance Moneys Payable to Father of Assured—Assignment by Father of his Interest to Wife of Assured—Subsequent Designation by Assured of Father as Beneficiary—Estoppel.

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By the terms of a policy of life insurance, the insurance moneys were payable to the father of the assured. Subsequently, the father made an assignment of his interest under the policy to the wife of the assured. Differences having arisen between the assured and his wife, they separated, and the assured made a direction or declaration that the policy should be for the benefit of his father:—

Held, that the right of the father under the subsequent direction was a different right from that which had been assigned to the wife; the doctrine of estoppel was not applicable, because some interest had passed by the assignment; and the father was entitled, as beneficiary, to the insurance moneys, upon the death of the assured.

MOTION by the Standard Life Assurance Company (upon originating notice) for an order for leave to pay into Court the amount due upon a policy of insurance upon the life of Irvin Kraft, deceased, and for an order determining to whom the amount should be paid.

December 20, 1918. The motion was heard by MEREDITH, C.J.C.P., in Chambers.

G. L. Smith, for the company.

M. A. Secord, K.C., for Dilman Kraft, the father of Irvin Kraft.

J. M. Ferguson, for Flora Elizabeth Kraft, widow of Irvin Kraft.

E. C. Cattanach, for the Official Guardian.

December 20. MEREDITH, C.J.C.P.:—The single question involved is: whether the second designation, made by the insured, of his father, is valid.

After the first designation of the father, the father assigned his right under it to the son's wife, and afterwards he "designated" the son's son; but that designation was admittedly ineffectual,

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even if treated as an equitable declaration of trust, because of the prior "assignment" to the son's wife. The insured admittedly and obviously could change the beneficiary—a beneficiary could not.

For reasons which apparently son and father considered imperative, they desired, and took steps, to deprive the wife and her son of all interest in the insurance: the means taken were the second designation by the insured of his father, which, if valid, had the desired effect.

But, though it is admitted and is obvious that the insured had power to deprive his son and wife, because he had power to deprive his father of his former right, and they took only under the father and had no higher right than he, it is contended that that object was not effected by the second designation of the father—that the insured had no power to make the later designation directly of him; that that could be effected only by first a designation to some third person and after that a designation to the father again.

That contention I decline to consider seriously. If it is to be held that the law requires such useless, for any sensible purposes, "circumlocution," some other Court must put the stigma upon it.

If the "assignment" to the wife—assuming the interest of the father—a changeable beneficiary only—to have been assignable, without considering the point—though really in effect but a secondary designation, and if it had been an assignment or declaration of trust for value, effect should not be given to it, not because the second designation was invalid, but because equity would attach to the fund again in the father's hand for his own benefit the right of the wife in it previously acquired for value.

Mr. Smith may take out an order for payment of the money in question into Court as sought by the insurance company; and, should no appeal against my ruling as to the right to the money be taken within 30 days, Mr. Secord may then take out an order for payment out of Court of the money to the father of the insured, less the costs of all parties of this motion, which are to be paid to them respectively.

Flora Elizabeth Kraft appealed from the order of MEREDITH, C.J.C.P.

March 24, 1919. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. M. Ferguson, for the appellant, referred to sec. 171 of the Insurance Act, R.S.O. 1914, ch. 183, and contended that the assured had never changed his beneficiary. He cited *Wilson v. Hicks* (1910-11), 21 O.L.R. 623, 23 O.L.R. 496; *Standing v. Bowring* (1885), 31 Ch. D. 282, 290.

M. A. Secord, K.C., for the respondent Dilman Kraft, argued that *Wilson v. Hicks* was an entirely different case, and relied on the judgment of the learned Judge in Chambers.

E. C. Cattnach, for the Official Guardian.

Ferguson, in reply, referred to *In re Turcan* (1888), 40 Ch. D. 5; *Brice v. Bannister* (1878), 3 Q.B.D. 569.

March 28. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by Flora Elizabeth Kraft from an order dated the 20th December, 1918, made by the Chief Justice of the Common Pleas, on an originating motion for the determination of the question as to the person entitled to the proceeds of a policy of life insurance effected by Irvin Kraft, deceased, the husband of the appellant, on his own life.

By the terms of the policy, the insurance money was payable to the respondent Dilman Kraft, who is the father of the deceased. After effecting the insurance, the deceased married the appellant, and what is in effect an assignment of his interest under the policy was made by the respondent Dilman Kraft to the appellant.

Subsequently differences arose between the deceased and his wife, and they separated, and the deceased then made a direction that the policy should be for the benefit of his father. The manifest purpose of this direction was to prevent the appellant from receiving, under the assignment which the respondent Dilman Kraft had made to her, the insurance money.

The appellant claims that she is entitled to the money; that whatever interest in it passed to the respondent Dilman Kraft, either under the terms of the policy or by virtue of the subsequent declaration, passed by the assignment from him to her.

I am of opinion that that contention is not well-founded. All that passed to her by the assignment was what the assignor was then entitled to. If no subsequent direction had been made by the

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deceased, she would have been the person entitled to the insurance money; but the deceased, in the exercise of his statutory right, determined that it should not go to her, but should go to his father, and so directed. The right of the father under this subsequent direction was a different right from that which had been assigned to the appellant. There is no room for the application of the doctrine of estoppel; that doctrine is applicable to a case where a person, who assigns something that he has no right or title to, subsequently acquires it, and, by the application of that doctrine in such a case, the assignment passes the interest acquired, and it is said to "feed the estoppel," and the assignment then takes effect in interest and not by estoppel. That doctrine has no application where some interest has passed by the assignment, as was the case here.

I would affirm the order appealed from and dismiss the appeal with costs.

Appeal dismissed.

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[APPELLATE DIVISION.]

SPROULE V. MURRAY.

Executors—Account—Will—Legacy to Executrix Payable at Death of Co-executor and Devisee—Duty of Executrix towards those Interested in Estate of Devisee—Release of Legacy for Limited Purpose, but Absolute in Terms—Right of Legatee to Shew that Legacy Unpaid—Payments Made by Devisee—Gifts—Onus—Corroboration—Moneys Deposited in Bank—Joint Account—Intention—Ownership—Survivorship—Payment Made to Executrix—Accounting for—Moneys of two Estates Mixed—Compensation Allowed to Executors by Surrogate Court Judge—Questioning in Action for Account—Remedy by Appeal—Surrogate Courts Act, R.S.O. 1914, ch. 62, secs. 34, 71—Trustee Act, R.S.O. 1914, ch. 121, sec. 67 (3)—Costs.

The defendant M. was the niece and housekeeper of her two uncles, and held powers of attorney from them to do all their business, sign cheques and notes, etc. Her uncle E. died in 1914; by his will, he gave her \$5,000, payable at the death of her uncle S., to whom E.'s estate was devised, subject to the payment of that legacy and of two others, which had been paid in full; and she and a banker, the other defendant, were the executors of E.'s will. S. died in 1915, and under his will the plaintiff and M. took equal shares in the residue of his estate; the same banker was the executor of S.'s will. The plaintiff sought an account of the dealings of the defendants with both estates:—

Held, that M., as executrix and legatee under E.'s will, owed no duty to those who would become interested in S.'s estate when he died, to see that sufficient assets were set apart by S. to meet her legacy at his death.

(2) That a release, executed by M. at the request of S., of her legacy, for the purpose of enabling S. to sell land upon which the legacy was a possible charge, did not estop M. from claiming her legacy. The release was absolute in terms, but in fact no payment had been made, and M. was entitled to shew the true state of affairs.

(3) That payments made by S. to M. or for her benefit were, upon the evidence, to be regarded as gifts, and not as payments in satisfaction *pro tanto* of the legacy. The onus of shewing that they were payments on account was upon those asserting it; and M.'s testimony that they were gifts was sufficiently corroborated, if that were necessary.

(4) That moneys deposited by S. to the credit of an account in a bank, opened by S. in the joint names of himself and M., were intended by S. to be devoted to his own support and that of his establishment, including M., during his life; and that involved the retention by him of the real ownership while he lived. If the testimony of M. was to be taken as establishing a joint ownership of the moneys deposited, there was no sufficient corroboration of it. The moneys remaining to the credit of the account belonged to the estate of S.

Review of the authorities.

Weese v. Weese (1916), 37 O.L.R. 649, distinguished.

Hill v. Hill (1904), 8 O.L.R. 710, and *Schwent v. Roetter* (1910), 21 O.L.R. 112, approved.

Daly v. Brown (1907), 39 Can. S.C.R. 122, 148, 149, specially referred to.

(5) That M., as executrix of E., was discharged of liability in respect of the amount of a cheque made payable to the E. estate and endorsed and cashed by her. She testified that she paid over the amount to S., and her statement did not require corroboration, under sec. 12 of the Evidence Act, in an accounting by her as executrix for money received after E.'s death—she could not be asked to account for it again as part of S.'s estate.

McClenaghan v. Perkins (1902), 5 O.L.R. 129, followed.

(6) That the amount allowed by the Surrogate Court Judge to the executors for their care, pains, and trouble, could not be questioned in an action for an account, nor otherwise than upon an appeal from the order of that Judge.

The Surrogate Courts Act, R.S.O. 1914, ch. 62, secs. 34 and 71, and the Trustee Act, R.S.O. 1914, ch. 121, sec. 67 (3), referred to.

(7) That the action was not an unreasonable one; but, the plaintiff having failed in her main contentions both in the action and on appeal, the costs should not be apportioned—each party should bear his or her own costs both of the action and appeal.

AN appeal by the plaintiff, a legatee under the will of Samuel McMillan, deceased, from the judgment of MEREDITH, C.J.C.P., at the trial, dismissing the action without costs, on payment of certain amounts omitted from the accounts as passed.

The following introductory statement of the facts is taken from the judgment of HODGINS, J.A.:—

The action is one for an account, involving the dealings of the respondents as executors of the will of the late Edward McMillan, who died on the 15th August, 1914, and of the respondent Madill as executor of the will of the late Samuel McMillan, who died on the 13th October, 1915.

A legacy of \$5,000 was given to the respondent Margaret Murray, by the will of Edward McMillan, payable at the death of Samuel McMillan, to whom the estate was devised, subject to the payment of that legacy and of two others, which have been paid in full. The respondent Margaret Murray was a niece of both the McMillans, their standby and housekeeper for many

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years, and held a power of attorney from both of them to do all their business, sign cheques and notes, etc., etc.

Under the will of Samuel McMillan, the appellant and the respondent Murray took equal shares in the residue.

The \$5,000 legacy not being payable until the death of Samuel McMillan, to whom the whole estate of Edward McMillan was devised, it was paid out of the assets of Samuel's estate by the respondent Madill.

February 14, 24, 25, and 26. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

J. E. Anderson and *A. M. Fulton*, for the appellant, argued that the legacy of \$5,000 to Margaret Murray should be treated as having been paid by Samuel McMillan in his lifetime. Of this, \$1,800 went in the purchase of a house, and the payment of the legacy is further evidenced by the release given by Margaret Murray. [HODGINS, J.A., referred to *Thompson v. Coulter* (1903), 34 Can. S.C.R. 261, on the question of statutory corroboration in such cases.] There is nothing to indicate that the joint account was intended by Samuel as a gift to Margaret Murray. She was entitled to use the money only for certain limited purposes, for which it would be convenient to have such an account. Reference was made to the following authorities: *Smith v. Gosnell* (1918), 43 O.L.R. 123; *Southby v. Southby* (1917), 40 O.L.R. 429, 435, 38 D.L.R. 700; *Hill v. Hill* (1904), 8 O.L.R. 710; *Daly v. Brown* (1907), 39 Can. S.C.R. 122; *Grant v. Grant* (1865), 34 Beav. 623; *Everly v. Dunkley* (1912), 27 O.L.R. 414, 8 D.L.R. 839; *Marshal v. Crutwell* (1875), L.R. 20 Eq. 328, 329; *Thompson v. Fairbairn* (1886), 11 P.R. 333; Halsbury's Laws of England, vol. 13, para. 509 (p. 365); *Vanzant v. Coates* (1917), 40 O.L.R. 556, 39 D.L.R. 485; on the question of allowance of interest on sums improperly paid or retained, *In re Hulkes* (1886), 33 Ch. D. 552; as to liability to account, Halsbury's Laws of England, vol. 14, para. 747 (p. 320); *In re Wilson and Toronto General Trusts Corporation* (1908), 15 O.L.R. 596; *Shaw v. Tackaberry* (1913), 29 O.L.R. 490, 15 D.L.R. 475.

J. M. Ferguson and *M. H. Roach*, for the defendants, respondents, argued that the release was not conclusive evidence of the payment of the legacy of \$5,000: *Carpenter v. Buller* (1841), 8

M. & W. 209, 212; *McMicken v. Ontario Bank* (1892), 20 Can. S.C.R. 548; *Brooke v. Haymes* (1868), L.R. 6 Eq. 25, 30. The respondents relied on the *Wilson* case, *supra*, as being conclusively in their favour so far as the main contentions of the appellant were concerned.

Anderson, in reply.

March 28. The judgment of the Court was read by HODGINS, J. A. (after setting out the facts as above):—Mr. Anderson argued with pertinacity and zeal for a proposition which I think is radically unsound. It was that, as the respondent Murray was an executrix under Edward McMillan's will and also a legatee, it was her duty to have seen that sufficient assets out of that estate were set apart by Samuel McMillan to meet the legacy at his death, in which case the Samuel McMillan estate would not have been called upon to pay it, so leaving a larger amount as the appellant's share. This duty, he argued, was one owed not to herself, but to those who would become interested in Samuel McMillan's estate when he died, and that consequently they were entitled, by reason of her neglect, to treat the legacy as having been paid, and to have an accounting on that basis. This would result in a division of Samuel McMillan's estate ignoring the true facts, and, if carried to its logical conclusion, would deprive the respondent Murray of her legacy if she had not insisted on Samuel McMillan setting it apart for her. I do not recognise any such duty in a legatee, who is also executrix, to insist on the earmarking of securities to meet a legacy, if the legatee does not desire so to do. It is her right, if in doubt as to the outcome of the estate in the hands of the devisee, to require her legacy to be secured in some fashion, but that is a personal right, not a duty which can possibly be owed to those who may become interested in the devisee's own estate. They are volunteers and can only take what is left after the payment of debts; and, if the devisee of the estate has failed to retain, as he should, the amount payable to the legatee, his estate is chargeable with it as a debt arising from his neglect to provide for payment. But it appears to be the fact that, when Edward McMillan died, he left assets of \$5,519.61, so that this interesting question does not actually arise, and I only deal with it because

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it was so strongly pressed. Having received these assets, which were sufficient to pay the respondent Murray, the executor of Samuel McMillan was entitled and bound to discharge the legacy, and it is immaterial that Samuel McMillan's own estate, and what he got from Edward McMillan, became mingled, and that payment was in fact made from the combined assets.

Two other principal matters were argued, as well as some smaller questions relating to individual assets.

Those two were, first, the effect of a release under seal of her \$5,000 legacy given by the respondent Murray, and, second, her right to appropriate the residue of an account opened in the Standard Bank by Samuel McMillan in his lifetime in his own name and that of the respondent Murray.

The appellant contends that the passing of accounts of both estates by the Surrogate Court of the County of Ontario, and the orders made thereon, are not binding on her, because it is not conclusively demonstrated by the respondents that notice of the appointments under which they proceeded was served upon her. It is, however, unnecessary to decide that point, because the course taken at the trial and before this Court involved the consideration of every possible item as to which any objection could exist.

It appears that, after Edward McMillan's death, Samuel McMillan decided to sell the farm in which he had been interested as part owner—an interest increased by the share therein of Edward McMillan which came to him under his brother's will. He agreed to sell it, and it was necessary to get a release of the legacies which under Edward McMillan's will were a possible charge upon the real estate. He asked the respondent Murray, and she consented, to release her legacy so that the sale could go through. The release is absolute in terms, but the facts in evidence shew that no payment had been made. I think the respondent Murray is entitled to shew the true state of affairs, and to claim her legacy notwithstanding the wide terms of the document she signed. No one now setting it up had at its date any vested interest in Samuel McMillan's estate. He himself was a party to its procurement for a limited purpose; and, unless those now claiming the right to take advantage of it were themselves misled or had changed their position, they are in no sense entitled to

claim an estoppel against her: *Carpenter v. Buller*, 8 M. & W. 209, 213.

A further contention is made that payments actually made to the respondent Murray were so made in payment or part payment of the legacy in question, or that it should be held that what was given or transferred to her by Samuel McMillan should be so dealt with, and that it should be determined that the legacy has been at all events partly satisfied.

This is largely based upon the purchase by Samuel McMillan of a house in Beaverton in the name of the respondent Murray and the payment of \$1,800 therefor.

So far as it is a matter of evidence, there is nothing to support the argument that this was or was intended to be a payment instead of a gift.

The relations between the niece and her old uncles had been very close since her infancy, and the only ones who testify make it clear that Samuel McMillan intended to make the purchase for her, and to live with her and under her care in the house he purchased, until he died. I do not think that it would be competent for the Surrogate Court to entertain the question as to the ownership of the house when taking the accounts of the estate, or whether it was obtained by undue influence, nor can we do so in appeal; but there is no objection, I think, to either Court determining whether the conveyance of the property should be treated as a payment and so a discharge to the executor as to the legacy *pro tanto*. Proof that it was so intended is a burden that lies on those asserting that fact, and here there is none. If it were necessary to corroborate the statement of the respondent Murray as to the gift, under the statute, I think the clear evidence of Roach, the solicitor acting then for the vendor, and the circumstances of the parties previous to and at the time, establish in material particulars what the respondent Murray deposes to.

The joint account presents more difficulty. At the trial the evidence given by the respondent Murray was as follows:—

“Q. Your uncle Samuel opened a joint account in the Standard Bank? A. Yes, on the 25th of March, 1915.

“Q. Did you know anything about that before? A. Yes, I did.

“Q. Tell us what took place? A. He come home and told me about it; he said, ‘There is money in the bank so you can pay

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up everything after I am gone'—funeral expenses—and then he says, 'You will have money to keep you until such time as the estate is settled; that may be a year or two.'

"Q. What was in the account, do you remember? A. There was eighteen hundred and something.

"Q. That is what was put in when the account was opened?
A. Yes.

"Q. And money was drawn out of that from time to time?
A. Yes.

"Q. Was there a bank-book? A. Yes.

"Q. Who had the bank-book? A. I had it.

"Q. Did you draw cheques on the account? A. Yes, I went and got the money as it was needed. We boarded a man from the plant, and his wife and child, for six months, and got nothing for it—

"Q. Never mind that. The account was disappearing?
A. Yes.

"Mr. Ferguson: Then the joint account was used for the running expenses of the house? A. Yes.

"Q. And the balance in the account at his death you took?
A. Yes.

"His Lordship: How much was it?

"Mr. Ferguson: \$1,072.90, my Lord."

Of her examination for discovery, the following questions and answers were put in:—

"83. Q. What became of the \$2,000 that was paid later on?
A. After payment of the balance of the house he put that in the joint account in the bank.

"84. Q. With you? A. With he and I.

"85. Q. That was the beginning of the joint account? A. Yes.

"86. Q. In March before he died? A. Yes.

"87. Q. And that was the beginning of the first joint account?
A. Yes."

"96. Q. Sam McMillan was illiterate, unable to read or write? A. He could read print, but not writing.

"97. Q. You had power of attorney from him to transact his banking business? A. Yes, in 1904.

"98. Q. He could not do banking business himself? A. He got very feeble and did not want to be bothered with it.

"99. Q. And the reason why this joint account was taken out was so that you could go ahead and transact the business? A. He told me and it was always a rule that he wanted to pay for everything right away, and after he made that he came home and said that I could always go ahead and do the same and that there was money left in the bank for me to do that and there is money in the bank for you to live on.

"100. Q. You weren't there when he took out the joint account? A. No, I was not.

"101. Q. But you signed the slip eventually? A. Yes.

"102. Q. How long after making the joint account? A. I do not remember."

"168. Q. Now in the disbursements in connection with the Sam McMillan estate there is an item of \$85 paid to Dr. McDermott: what do you know about that? A. I paid that.

"169. Q. Where did you get the money from? Out of the joint account? A. Yes. There was a custom in that house to pay everything in spot cash, and he gave me those instructions when he passed away that he left this money in the bank for me and to pay everything.

"170. Q. Did you pay it in one cheque? A. On the 23rd October.

"171. Q. And how about Dr. Smith's account of \$29.55? A. I paid that.

"172. Q. The undertaker's of \$143.75, how was that paid? A. Joint account, just the same.

"173. Q. Then the Frank Lapp of \$9, that was paid out of the joint account? A. Yes."

The respondent Madill, on his examination for discovery, refers to the joint account thus:—

"349. Q. Did he have any money in the bank himself when he died? A. No.

"350. Q. Neither joint account or otherwise? A. There was a joint account.

"351. Q. In whose name? A. Sam McMillan and Margaret Murray.

"352. Q. Is that accounted for in the estate in any way? A. No.

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"353. Q. Why? A. Because it was for the survivor.

"354. Q. Wouldn't that be an asset of the Sam McMillan estate? A. No, it was transferred to the Margaret Murray estate. The bank transferred it. We did it for Miss Murray."

The money was Samuel McMillan's and the joint account evidently his own idea. Previously to the opening of the joint account, the respondent Murray had a power of attorney and used to draw on her uncle's account in the bank as occasion required. There was, no doubt, some reason in his mind for making the change. The direction given by him is stated differently in the extracts I have quoted. But substantially the expressed wish and the power given to her were that she should pay the running household and ordinary outgoings, his funeral expenses, and use it for her support after his death, while it lasted. The bank-book is produced and discloses nothing as to the depositors or the terms on which the money was left with the bank, except that the regulations printed in the book are so drawn as to deal with a single depositor. Although the banker, the respondent Madill, was called, no inquiry was made as to the terms of deposit.

I think the fair conclusion from what appears is that Samuel McMillan intended to have the money devoted to his own support and that of his establishment, including the respondent Murray, during his life—and that when he died, and then only, the money was to become the respondent's. I cannot find that the respondent Murray was to become jointly interested in the money in such a way as to give her the absolute right to dispose of it, irrespective of the instructions or directions given by Samuel McMillan. The absence of this element seems to me to involve the retention by him of the real ownership of the money while he lived. It was to be his, but she was free to spend it for certain purposes, which extended even after his death. She was to pay his funeral expenses, and then to have it for her support.

This absence of joint ownership, as I see it, distinguishes this case from *Weese v. Weese* (1916), 37 O.L.R. 649. The circumstances indicating the difference between joint interest and "a mere arrangement for convenience," leaving the ownership in the depositor whose money it was, may be seen in *Marshal v. Crutwell*, L.R. 20 Eq. 328, and in *Everly v. Dunkley*, 27 O.L.R. 414, 8 D.L.R. 839.

In *Hill v. Hill*, 8 O.L.R. 710, there was a deposit receipt shewing that the money was to be payable to father and son "or the survivor," but the understanding between the parties was that the money should remain subject to the father's control and disposition and that whatever should be left at his death should then belong to the son. The money was held to belong to the father's estate, and the circumstances were regarded as pointing to an ineffectual attempt to make a testamentary gift.

I cannot distinguish this from the present case. It is clear from the evidence of the respondent Murray that "it was always a rule that he wanted to pay for everything right away, and after he made that he . . . said I could always go ahead and do the same and that there was money left in the bank for me to do that." It may reasonably be assumed that, had the respondent Murray neglected to pay the household and other expenses promptly, her uncle would have at once asserted his right and ownership.

Mr. Justice Maclellan, in *Daly v. Brown*, 39 Can. S.C.R. 122, at pp. 148, 149, makes some remarks which are rather in point here:—

"In a case of joint tenancy neither party is exclusive owner of the whole. Neither can appropriate the whole to himself. Here, however, the father did not lose his right to take the whole, by authorising his daughter also to draw. He could still draw the whole whenever he pleased, up to the day of his death, and; if he did, it would all be his own money. Could his daughter have done that? I do not think so. She could as against the bank have drawn it all, and a payment to her would have discharged the bank; but the money would still have been the father's money in her hands. She would have been accountable to him for it all."

In *Schwent v. Roetter* (1910), 21 O.L.R. 112, Mr. Justice Riddell reviews the English and Canadian cases and points to exclusive control for the life of the deceased as making a distinction to be borne in mind in considering the decisions.

A Divisional Court, in which the trial Judge here presided, *Southby v. Southby*, 40 O.L.R. 429, decided the case against the survivor wholly upon the ground that, notwithstanding the terms of the direction to the bank, the deposit was simply a mode of conveniently managing the husband's affairs.

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See also *Smith v. Gosnell*, 43 O.L.R. 123.

In the case in hand, but for the evidence of the respondent Madill, there is no corroboration of the statements of Miss Murray, if these are to be taken as establishing a joint tenancy in the deposit. That this is necessary is stated in *Schwent v. Roetter* (*ante*). Madill, however, only corroborates the fact that there was a joint account and that, in his view, it was to be for the survivor. But he does not say why he so thought or so treated the account, nor what kind of a joint account it was. His evidence is not sufficient to corroborate the exact terms which Miss Murray deposes to and on which the case must necessarily be decided. In my view, the residue of the account belonged to Samuel McMillan's estate.

Dealing now with the smaller items: The first is \$30, based on a cheque payable to the Edward McMillan estate and endorsed and cashed by the respondent Murray. She deposes that she paid the proceeds over to Samuel McMillan, but it is objected that her statement needs corroboration, and *Thompson v. Coulter*, 34 Can. S.C.R. 261, is relied on. But this is an accounting by an executrix and in a matter arising after Edward McMillan's death, so that the statute does not apply. If the respondent Murray's statement is believed, and no one denies it, then she, as executrix of Edward McMillan, is discharged of liability for this item, and no question as to it can arise, because it was Samuel's property under Edward McMillan's will, and the executrix, having proved a proper disposition of it under that will, cannot be asked to account for it again as part of Samuel's estate: *McClenaghan v. Perkins* (1902), 5 O.L.R. 129.

(2) One half of the balance on the sale of the farm assets is claimed as belonging to Edward McMillan. If this item is open to the appellant, it seems to be satisfactorily disposed of. Samuel McMillan, the residuary legatee of Edward, his brother, conducted the sale and paid the whole proceeds into his own account. The respondent Murray never got them or any part of them. I do not regard the entries in the auctioneer's book as sufficient proof, unless amplified by some evidence verifying and explaining them, to charge any one with responsibility for more than is sworn to be the real amount in which Edward's estate and Samuel McMillan were interested. The notes were all accounted for as they were paid

except the McLennan note, the proceeds of which came in after the accounts were passed, and one half of which was paid to the appellant. There is nothing to support the suggestion that more was received than has been accounted for. Samuel McMillan was capable of dealing with his own interests at the sale, and what he got in cash during his life and the notes found after his death in the bank are the limit of accountability on the evidence given at the trial.

(3) Two items of bank interest, \$22.10. Mr. Roach, solicitor for the respondents, says that these two items are included in the balance of \$299.99, which was turned over from the Edward McMillan estate to the Samuel McMillan estate, and are accounted for in that estate. There is nothing to cast any doubt on this statement, and it must be accepted.

(4) Commission has been allowed by the Surrogate Court Judge at \$420, and of this \$220 is objected to. In my judgment, this is not a matter that can be gone into here. The parties, if notified of the passing of the accounts, should have appealed against the allowance, and, if not notified, should have, when they learned the amount, applied to that Court for leave to reopen the matter or to appeal. The allowance for care, pains, and trouble is a personal one given by statute to the trustee or executor and is no part of his account as such. It is only when an executor is asked to account in the Supreme Court that the question of notice of the passing of the accounts in the Surrogate Court becomes important (Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 71*),

*71.—(1) Where an executor . . . has filed in the proper Surrogate Court an account of his dealings with the estate, and the Judge has approved thereof, in whole or in part, if he is subsequently required to pass his accounts in the Supreme Court, such approval, except so far as mistake or fraud is shewn, shall be binding upon any person who was notified of the proceedings taken before the Surrogate Judge, or who was present or represented thereat, and upon every one claiming under any such person.

(3) The Judge, on passing the accounts of an executor . . . shall have jurisdiction to enter into and make full inquiry and accounting of and concerning the whole property which the deceased was possessed of or entitled to, and the administration and disbursement thereof, in as full and ample a manner as may be done in the Master's office under an administration order, and, for such purpose, may take evidence and decide all disputed matters arising in such accounting subject to an appeal under section 34.

(4) The persons interested in the taking of such accounts or the making of such inquiries shall, if resident within Ontario, be entitled to not less than seven days' notice thereof, and, if resident out of Ontario, shall be entitled to such notice as the Judge shall direct.

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or when the Surrogate Court is dealing with the compensation or on appeal therefrom. It cannot be that, if the Surrogate Court Judge has allowed compensation, an action for an account can be brought in the Supreme Court to review that decision. And, if such an action would not lie upon that one cause of action, then it is not competent to attack the amount even when an action for a general accounting might be brought. I therefore decline to go into the matter, but I am glad to think that, with the detailed knowledge which I have acquired in dealing with this appeal, no great injustice has been done in the amount allowed, even though the chief assets consisted of mortgages which were assigned to the beneficiaries. But, whether that is so or not, and it is not the test to be applied in this case, I do not think the amount can be questioned save by way of appeal as provided by virtue of the combined effect of the Trustee Act, R.S.O. 1914, ch. 121, sec. 67, sub-sec. 3, and the Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 34.*

(5) \$67 in Samuel McMillan's bank-account which the respondent Murray, in her examination for discovery, says has not been accounted for. The evidence does not disclose whether this is really included in the accounts, but the Registrar of this Court may, on settling the judgment, inquire into it and direct payment if the appellant is really entitled to a share of it.

(6) Interest on the amounts withheld until shortly before the trial. These are \$100 (interest on Ritchie mortgage), \$52.50 (McLennan note), and perhaps some other small items. The Registrar may allow interest on them from the date of the writ.

(7) Succession duties to the amount of \$328.61 were paid. The debt of \$5,000 was not deducted, and so the amount paid the Government was too large. The executor is trying to get something back and if he does will account for it. He is willing to

*Section 67, sub-sec. 3, of the Trustee Act is as follows:—

(3) The Judge of a Surrogate Court, in passing the accounts of a trustee under a will . . . may from time to time allow to him a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the estate.

Section 34 of the Surrogate Courts Act is in part as follows:—

34.—(1) Any person who deems himself aggrieved by an order, determination or judgment of a Surrogate Court, in any matter or cause, may appeal therefrom to a Divisional Court.

(5) An appeal shall also lie from any order, decision or determination of the Judge of a Surrogate Court, on the taking of accounts . . .

apportion this between the beneficiaries, and the Registrar may deal with this as well.

(8) Costs. Counsel for the appellant argues that the action was necessary and that she should get her costs. It must be admitted that the estates of the two brothers were mixed together, and Mr. Madill, executor of each, says that the accounts were not properly kept, but that no one was the loser, as the estates were properly administered. It is unfortunate that Mr. Stewart, the former solicitor of the appellant, died some time ago. It appeared from Mr. Roach's letter of the 13th June, 1916, that Mr. Stewart had personally gone over the affairs of both estates and was completely satisfied. Things dragged on however. Mr. Donelly went overseas, and it was not until about a week before the trial that a final offer was made to pay the appellant's share of the McLennan note, \$52.50; one half of the Ritchie interest, \$50; one half of the deposit paid on the Beaverton house purchase, \$25; to apportion the succession duties between the beneficiaries; to pay the share of the appellant of the bank interest and the costs of the action on the County Court scale. This was refused, and the trial proceeded. I think up to that time the action was not an unreasonable proceeding in the interest of all parties; but, after that offer, the appellant should, I think, be confined to what may result from the determination of her legal rights.

I have, as already stated, not considered the question whether the appellant is or is not bound by the accounts passed by the Surrogate Court. It is contended that she had no notice of them; but, owing to the course the case has taken, it makes little matter, for everything objected to has been gone into and is dealt with herein, and no case has been made out for a general retaking of the accounts. But there is no evidence before this Court that the appellant was not notified. The onus was upon her, in view of the orders of the Surrogate Court Judge, having regard to the provisions of the Surrogate Courts Act, sec. 71. It is not to be assumed, without clear evidence, that the Surrogate Court Judge disregarded the provisions of sub-sec. 4 of sec. 71.

The proper result of what has been said is that the judgment at the trial should be varied, and a judgment directed to be entered referring to the Registrar of this Court the items specially mentioned as proper to be dealt with by him, and directing pay-

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ment of them, as well as of the other sums, if any, referred to in the letter of Mr. Roach dated the 21st November, 1918, and one half of the amount properly payable to the appellant as her share of the moneys in the joint account at the time of the death of Samuel McMillan, less payments properly made thereout, which amount can be ascertained by the Registrar, with interest on them from the date of the writ.

As to costs: the action was not an unreasonable one, but, in view of the small success it achieved, and the failure of the appellant upon her main contentions both in the action and on appeal, I think that, instead of our endeavoring to apportion the costs, each party may well bear his or her own costs both of the action and appeal.

Judgment below varied.

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[IN CHAMBERS.]

March 31

REX v. BERLIN LION BREWERY LIMITED.

Ontario Temperance Act—Magistrate's Conviction of Licensed Brewer for Unlawful Sale of Intoxicating Liquor—Order for Forfeiture of License—Dominion Act in Aid of Provincial Prohibitory Legislation, 6 & 7 Geo. V. ch. 19, sec. 2—"Third Offence"—Previous Convictions—Method of Proof—Secs. 58, 59, 96, 97, and sched. F., 6 Geo. V. ch. 50 (O.)

By sec. 2 of an Act in aid of Provincial Legislation prohibiting or restricting the sale or use of Intoxicating Liquors, 6 & 7 Geo. V. ch. 19 (Dom.), any person holding a license to carry on the business of a brewer who sells intoxicating liquor in violation of the law in force in any Province shall be liable in any prosecution under such provincial law, on conviction for a third offence, to forfeit his license:—

Held, that the expression "third offence" must be given the meaning which it bears in the Province under the law of which the prosecution takes place: in Ontario "a conviction for a third offence" means a conviction for an offence which is charged as a third offence: secs. 58, 59, 96, 97, and forms in schedule F., Ontario Temperance Act, 6 Geo. V. ch. 50.

The defendants, licensed brewers, were charged with having committed an offence against the Ontario Temperance Act by the unlawful sale of intoxicating liquor, but were not prosecuted for a third offence. Upon their trial before a police magistrate, writings signed by two other police magistrates certifying to three convictions of the defendants for selling intoxicating liquor in violation of the Ontario Act were put in. The magistrate convicted the defendants of the offence directly charged, found that the prior convictions had been duly proved, declared that the defendants had become liable to have their license forfeited, and ordered that it should be forfeited:—

Held, that there was no such conviction or valid conviction for a third offence as conferred upon the magistrate jurisdiction to forfeit the license; and the declaration and order should be quashed.

Held, also, that there was no proper evidence before the magistrate that the defendants had been three times convicted.

THIS was a motion by the defendants to quash an order made by the Police Magistrate for the City of Guelph, on the 28th January, 1919, whereby it was found that the defendants had become liable, under the Act in aid of Provincial Legislation prohibiting or restricting the sale or use of Intoxicating Liquors, 6 & 7 Geo. V. ch. 19 (Dom.), to the forfeiture of their brewer's license issued under the Inland Revenue Act, and whereby it was ordered that the said license be forfeited.

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March 4. The motion was heard by ROSE, J., in Chambers.
J. M. Ferguson, for the defendants.
J. R. Cartwright, K.C., for the magistrate and informant.

March 31. ROSE, J.:—The section of 6 & 7 Geo. V. ch. 19 under which the order in question purports to be made is sec. 2. It is argued on the part of the defendants that, upon the true reading of the whole of that section, no jurisdiction to forfeit the license is conferred upon the magistrate except upon the trial of a charge of an offence against sec. 1 of the same Act. This point does not appear to me to be well taken. As I read sec. 2, the opening words, which do relate to offences against sec. 1, may be left out of consideration, so far as this case is concerned, and the section may be taken to be as follows:—

“Any person holding a license to carry on the business or trade of a distiller or brewer, issued under the provisions of the Inland Revenue Act, who . . . sells . . . intoxicating liquor in violation of the law in force in any province, shall . . . be liable in any prosecution . . . under such provincial law, on conviction for a third offence, to forfeit his license and shall thereafter be unable to hold such a license.”*

Reading the section in that way, the inquiry in the present case becomes an inquiry whether, in a prosecution under the Ontario Temperance Act, 6 Geo. V. ch. 50, the defendants were duly convicted for a third offence.

*The section in full is as follows:—

2. In addition to any other penalties prescribed for a violation of section 1 of this Act, any person holding a license to carry on the business or trade of a distiller or brewer, issued under the provisions of the Inland Revenue Act, who violates the provisions of section 1 of this Act, or who sells or delivers intoxicating liquor in violation of the law in force in any province, shall also be liable in any prosecution under this Act, or under such provincial law, on conviction for a third offence, to forfeit his license and shall thereafter be unable to hold such a license.

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The information laid, and the charge upon which the defendants were tried, was that they did, on a certain day, and at a certain place, "unlawfully sell liquor in contravention of the Ontario Temperance Act" to a person named in the information.

Before the trial, the informant served upon the defendants a notice that upon the hearing he would apply to the magistrate trying or disposing of the charge for an order, under sec. 2 of 6 & 7 Geo. V. ch. 19, cancelling the license issued to the defendants under the Inland Revenue Act, upon the ground that the defendants had been "three times convicted of selling intoxicating liquor since the 19th day of May, 1916, in violation of the Ontario Temperance Act;" and in the notice he set out with particularity the alleged convictions.

When the matter came before the magistrate, the defendants pleaded "not guilty" to the charge laid. Thereupon counsel for the prosecution read the notice to which reference has been made, and stated that he proposed "to proceed with that branch of the case before going further with the charge that (had) been laid;" and he proceeded to give evidence, which was objected to, that the defendants held a brewer's license issued under the Inland Revenue Act, and he put in, also in the face of objection, writings signed by the Police Magistrates at Brantford and Kitchener certifying to the three convictions. After this was all done, evidence seems to have been given in support of the charge to which the defendants had pleaded; and there was an adjournment for a week to enable the magistrate to consider his judgment. On the appointed day, the magistrate found the defendants guilty of the offence charged, and gave reasons in writing for holding that the prior convictions had been duly proved, and for construing sec. 2 of 6 & 7 Geo. V. ch. 19 (Dom.) as providing that once three convictions of a licensee are proved, in the manner provided by sec. 96 of the Ontario Temperance Act, the license is to be forfeited; and a formal conviction and order was drawn up convicting the defendants of the single offence charged against them, and fining them \$200 in respect of it, and, after reciting the previous convictions, finding that the defendants had become liable to have their license forfeited, and ordering it to be forfeited.

I am unable to read the section as conferring upon the magistrate jurisdiction to proceed in the way in which he did proceed.

His jurisdiction to forfeit the license exists only "in a prosecution" under the Dominion Act or under a provincial law, and "on conviction for a third offence." It appears to me that, in construing a Dominion Act in which reference is made to a prosecution under a provincial law and to a conviction, upon such prosecution, for a third offence, the expression "third offence" must be given the meaning which it bears in the Province under the law of which the prosecution takes place. Now in Ontario it is perfectly well understood that a conviction for a third offence means a conviction for an offence which is charged as a third offence; that appears plainly from the Ontario Temperance Act itself. By sec. 96 of that Act, provision is made for a special procedure upon an information for an offence where a previous conviction is charged; and, by sec. 97, the inspector is required to prosecute as for a second or subsequent offence when prosecuting for an offence of which the offender has been previously convicted and for which a different or greater penalty is imposed in the case of a second or any subsequent offence; the penalties for second and subsequent offences against most of the provisions of the Act are greater than or different from the penalties for a first offence: secs. 58 and 59; and special forms of information and of conviction for second and subsequent offences are prescribed: see schedule "F."

In this case, as has been stated, there was no prosecution for a third offence, and, before the magistrate, the proceedings were entirely different from the proceedings which ought to have been taken if the prosecution had been for a third offence: indeed the magistrate, by receiving evidence as to the prior convictions before he had heard and disposed of the new charge, adopted a course which, as has been recently decided by Mr. Justice Clute, would have called for the quashing of the conviction, if it had been a conviction for a third offence: *Rex v. Mercier* (1919), 16 O.W.N. 33.* There was, then, no such conviction, or valid conviction, for a third offence as conferred upon the magistrate jurisdiction to forfeit the license; and, for that reason, the declaration that the defendants had become liable to the forfeiture of their license, and the order forfeiting it, must be quashed.

There is, moreover, another reason why, in my opinion, the order must be held to be invalid, viz., that, even if the magistrate

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is right in thinking that jurisdiction to forfeit the license arises upon proof of three convictions, and not only upon conviction for "a third offence," technically so called, there was no evidence before the magistrate that the defendants had been three times convicted. What the magistrate accepted as evidence of the previous convictions were the certificates, which have been mentioned, under the hands of the Police Magistrates at Brantford and Kitchener. Apart from special legislation giving evidentiary value to these certificates, they are not evidence of the facts stated in them: the method of proving a conviction at common law is by the production of the record, or an examined copy of it: *Hartley v. Hindmarsh* (1866), L.R. 1 C.P. 553. What the magistrate thought was, that sec. 96 (b) of the Ontario Temperance Act made the certificates *prima facie* evidence of the convictions; but sec. 96 does no more than enact what shall be "the proceedings upon any information for an offence against any of the provisions of (the) Act in a case where a previous conviction or convictions are charged," and para. (b), which makes the certificates *prima facie* evidence of the former convictions, has no application to any proceeding other than such a proceeding where a previous conviction or convictions are charged, i.e., a proceeding for a second or subsequent offence, strictly so-called. This, as I have shewn, was not a proceeding for a second or subsequent offence; there was, therefore, no legal evidence of the previous convictions; and the finding and order must be quashed.

There will be the usual order for the protection of the magistrate and officers concerned. There will be no order as to costs.

[APPELLATE DIVISION.]

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April 1

REAMSBOTTOM V. TOWN OF HAILEYBURY.

Assessment and Taxes—Assessment of Land—Omission from Assessment Roll of Value of Buildings on Land—Clerical Error—Entry in Next Collector's Roll—Correction of Error—Application of sec. 54 of Assessment Act, R.S.O. 1914, ch. 195—"Land Liable to Assessment"—Secs. 2 (h) and 22 (3) of Act.

In assessing land which had been built upon, the defendants' assessor put down in the proper column of the assessment roll of 1913 the value of the land exclusive of the buildings; but, by clerical error or other mistake, omitted to put down in another column, the value of the buildings (sec. 22 (3) of the Assessment Act, R.S.O. 1914, ch. 195). The mistake having been observed by the clerk of the municipality, he made an entry in the next collector's roll (1914), in manner provided by sec. 54 of the Act:—

Held, that the buildings were "land liable to assessment," apart from any provisions of the Act, as well as expressly under it—sec. 2 (h)—and land which must be separately valued; it would be too narrow a view of sec. 54 to confine its beneficial operation to cases in which there had been a total omission to tax; and the mistake was curable under sec. 54.

Judgment of the District Court of the District of Temiskaming affirmed.

AN appeal by the plaintiff from the judgment of the Judge of the District Court of the District of Temiskaming dismissing an action brought in that Court to obtain a declaration that certain taxes imposed for the year 1913 in respect of a lot in the town of Haileybury were not owing and were not the subject of a charge or lien upon the lot.

The reasons for judgment of the learned District Court Judge were as follows:—

The plaintiff, administratrix of the estate of William A. Reamsbottom, claims a declaration that certain taxes for the year 1913, in respect of lot 54, plan M. 54, Town of Haileybury, are not owing, chargeable, or payable, in respect of the said lot, and form no charge and no lien thereon.

The said lot, together with the buildings thereon, was assessed to one Jones, from whom the said Reamsbottom purchased, for the years 1910, 1911, and 1912. In the year 1913 the town assessor assessed the lot, but omitted through oversight to place in the assessment roll the amount at which he intended to assess the buildings thereon, which buildings had been assessed separately for the three previous years at \$3,800. The omission came to the knowledge of the town clerk in preparing his collector's roll, and

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he entered therein, i.e., in his next roll, the value of the said buildings at \$3,800. This assessment was brought to the knowledge of the then owner, and no petition or appeal was tendered to or received by the Court of Revision for the said town, relative thereto, at any time before or since the 1st July of the year following. The Assessment Act, R.S.O. 1914, ch. 195, sec. 40, provides that the value of the land and buildings shall be ascertained separately, and shall be set down separately in the roll, and the assessment shall be the sum of such values.

In this assessment the value of the buildings was not set down; and, although "land" includes buildings, the Act distinctly provides for a separate assessment of the buildings; and, this having clearly been unintentionally omitted, sec. 54* of the said Act requires the same to be done. I find that the assessment was regularly and properly made, and that no petition was received by the Court of Revision within the time allowed by sec. 118 of the said Act.

The roll was passed by the Court and certified by the clerk as passed (sec. 70); but an omission to assess is not included within the meaning of the words "defect" and "error" used in sec. 70, so as to preclude or bind the municipality from assessing the said buildings.

The action will be dismissed with costs.

April 1. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

R. McKay, K.C., for the appellant, argued that the curative section, No. 54, could not be invoked to remedy the mistake which had been made here, as that section covers only cases of "land liable to assessment," which "has not been assessed:" *Nicholls v. Cumming* (1877), 1 Can. S.C.R. 395.

*54. If at any time it appears to the treasurer or other officer of the municipality that land liable to assessment has not been assessed for the current year or for either or both of the next two preceding years, he shall report the same to the clerk of the municipality, or if the omission to assess comes to the knowledge of the clerk of the municipality in any other way, he shall enter such land on the next collector's roll . . . as well for the arrears of the preceding year or years, if any, as for the tax of the current year; and the valuation of the land shall be the average of the three previous years . . . and the owner of the land shall have the right to appeal, as provided in section 112.

By sec. 8 of the Assessment Amendment Act, 1917, 7 Geo. V. ch. 45, the figures "112" in the last line of sec. 54 were struck out and the figures "118" substituted therefor.

J. M. Ferguson, for the defendants, respondents, was not called upon.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—We agree with the District Court Judge in considering that the facts of this case bring it within the provisions of sec. 54 of the Assessment Act: and, if so, admittedly the action was rightly dismissed, as this appeal also should be.

The Act (sec. 22 (3)) requires that the assessor shall set down in one column of the assessment roll the actual value of the real property assessed, exclusive of the buildings thereon; in another column, the value of the buildings as determined under sec. 40; in another column, the total actual value of the land; and in another, the total amount of taxable land.

The provisions of the Act had been complied with for several years before the year in question—1913: the buildings on the lot in question being assessed, and put down in the proper column, at \$3,800, and the land at \$400, and the total at \$4,200; on which sum taxes had been paid without objection.

In the year 1913, through clerical error, or other obvious mistake, the value of the buildings—\$3,800—was left out of the roll and out of the notice of assessment.

The mistake having been observed by the clerk of the municipality, he made an entry in the next collector's roll, in manner provided by sec. 54, and so, if that section is applicable, corrected the error.

Mr. McKay's one contention is: that the omission of the value of the buildings was not such a mistake as may be cured by sec. 54, which covers only cases of "land liable to assessment," which "has not been assessed." But, agreeing with the District Court Judge, we are of opinion that it does. It is obvious that the buildings are "land liable to assessment," apart from any special provisions of the Act, as well as expressly under it: sec. 2 (h)*; and not only so, but land which must be separately valued; and it would be quite too narrow a view of the section to confine its beneficial operation to cases in which there has been a total omission to tax; neither its words nor its purposes warrant that.

Appeal dismissed with costs.

*By sec. 2 (h), "land" includes, *inter alia*, "all buildings, or any part of any building . . . erected or placed upon . . . land."

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April 4

[APPELLATE DIVISION.]

BURTON v. HOOKWITH.

Mechanics' Liens—Claims of Material-men—Building not Finished by Contractor—Overpayment by Owner—Contract to Do Entire Work for Stipulated Price, Payable on Completion—Owner not Required to Create Statutory Fund for Benefit of Claimants of Liens—Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 12 (1).

A contract for the building of a house was in writing; one sum of money, \$1,440, was to be paid by the owner for the whole work, and was to be paid when the work was done; the work was never completed—in value more than \$600 worth was never done; but the owner paid to the contractor, as the work progressed, \$1,150:—

Held, that, in such circumstances, the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, does not require the owner to create a fund by deducting 20 per cent. from any payment to be made by him in respect of the contract (sec. 12 (1)); and, nothing being payable by the owner to the contractor, the claims for liens of those who supplied materials to the contractor could not be enforced against the owner.

Farrell v. Gallagher (1911), 23 O.L.R. 130, *Rice Lewis & Son Limited v. George Rathbone Limited* (1913), 27 O.L.R. 630, and *H. Dakin & Co. Limited v. Lee*, [1916] 1 K.B. 566, explained.

APPEAL by the defendants Milton J. Hookwith and Florence M. Hookwith, the owners, from the judgment of MACWATT, Judge of the County Court of the County of Lambton, in favour of the plaintiffs, material-men, in three actions against the same defendants, brought to enforce the plaintiffs' respective liens under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, and consolidated and tried together.

The defendant Shaw contracted with the appellants to build a house upon two lots in the village of Courtright, for a lump-sum. The plaintiffs supplied materials to the contractor. The work which the contractor undertook was not completed. Payments were made by the owners to the contractor on account of the contract-price, to an amount exceeding the value of the work actually done.

The learned County Court Judge overruled the contentions made before him for the owners, viz., that it is only on contracts to pay on progress certificates that the owner is bound to hold back 20 per cent. under the Act, and that nothing was owing by the owners because the work was never completed.

March 17. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

A. Weir, for the appellants, argued that nothing was payable under the contract until its completion, referring to *Sherlock v. Powell* (1899), 26 A.R. 407. At all events the amount awarded was excessive from any point of view. The *Sherlock* case shews that there was nothing here for the liens to take hold of. [MEREDITH, C.J.C.P., referred to *H. Dakin & Co. Limited v. Lee*, [1916] 1 K.B. 566, as being opposed to counsel's view.] Our case is on all fours with *Goddard v. Coulson* (1884), 10 A.R. 1. He also referred to the following cases and authorities: *Rice Lewis & Son Limited v. George Rathbone Limited* (1913), 27 O.L.R. 630, 9 D.L.R. 114; *Russell v. French* (1897), 28 O.R. 215, *per Rose*, at p. 220; article on Mechanics' Liens, in *Canada Law Journal*, vol. 41, p. 733, at p. 739; *Farrell v. Gallagher* (1911), 23 O.L.R. 130; *In re Sear and Woods* (1893), 23 O.R. 474; *King v. Low* (1901), 3 O.L.R. 234.

J. M. Bullen, for the respondents, the plaintiffs, referred to *Russell v. French*, 28 O.R. at p. 215, and argued that the *Goddard* and *Sear* cases were not in point. He referred to the Addenda to the second edition of Wallace on Mechanics' Liens, where the *Rice Lewis & Son* case is cited; also to *Milton Pressed Brick Co. v. Whalley* (1918), 42 O.L.R. 369, 379, 42 D.L.R. 395. The *Dakin* case was applied and followed in *Tay or Hardware Co. v. Hunt* (1917), 39 O.L.R. 85, 88, 35 D.L.R. 504. Reference was also made to *Hurst v. Morris* (1914), 32 O.L.R. 346; *Morris v. Tharle* (1893), 24 O.R. 159; *Baines v. Curley* (1916), 38 O.L.R. 301, 33 D.L.R. 309.

Weir, in reply.

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April 4. MIDDLETON, J.:—The material facts are not in dispute.

The contract-price was.....	\$1,440.00	
Extras allowed.....	138.50	\$1,578.50
Amount necessary to complete contract....	\$640.75	
Allowance for defective work.....	100.00	740.75
Amount payable to contractor if entitled on <i>quantum meruit</i>		837.75
Amount paid by owner.....		1,150.00
Amount to be refunded.....	\$ 312.25	

The contract is to do the entire work for the stipulated price, and the contractor, as he did not complete the building, in one view

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might not have the right to recover anything, but this is not of importance, as the owners have paid him more than would be recoverable in any event.

There seems to be a curious misunderstanding as to the effect of the decided cases.

Farrell v. Gallagher, 23 O.L.R. 130, and *McManus v. Rothschild* (1911), 25 O.L.R. 138, rightly emphasised the fact that the Mechanics and Wage-Earners Lien Act provides that the owner shall, save as provided by the Act, not be liable for more than the amount rightly payable by him to the contractor.

In *Rice Lewis & Son Limited v. George Rathbone Limited*, 27 O.L.R. 630, 9 D.L.R. 114, it was held that the 20 per cent. to be retained for lien-holders from any payments to be made was one of the things excepted from this protection extended to the owner, and that *Russell v. French*, 28 O.R. 215, when "rightly understood," determined no more than this.

This is very plain both from the judgments of my Lord (then Meredith, J.A.) and of Mr. Justice Magee in the *Rice Lewis & Son* case.

"Under the contract in question, 80 per cent. of the value of the work done, to be estimated at contract-prices, was to be paid, from time to time, on progress certificates, by the owner to the contractors; and a very considerable sum thus became payable to them; which, if it had not been paid, they could have recovered in an action, except as to '20 per cent.' of it, which the Act required the owner to retain for the benefit of others who were putting their labour and building materials into his building, and might have liens for them" (p. 631).

"Different considerations would apply if there had been no contract to pay except on fulfilment of the contract on the contractors' part.

"The Act, thus understood, creates no hardship on the owner; . . . if he retain 20 per cent. out of every payment he has made himself liable for by his contract, he does that which the Act requires, and is as well off as if the Act had never been passed" (pp. 632-633).

(These passages from the judgment of my Lord.)

"If an owner contemplating building chooses to say, 'I will not pay until completion,' I do not see that the statute has advanced

the rights of general lien-holders, not being wage-earners, beyond the position of the plaintiff in *Goddard v. Coulson*, 10 A.R. 1, and they are still limited to the amount owing from the owner If the owner chooses to agree to make payments to the contractor before completion, he cannot complain that a portion of that which he is willing to part with should be set aside, not for his security, but for the security of others whose labour or materials have gone to benefit his property" (p. 639).

"The charge is . . . upon money which has actually become payable, a payment which is to be made and is directed to be retained" (p. 640).

(These passages from the judgment of Magee, J.A.)

This demonstrates that in *Rice Lewis & Son Limited v. George Rathbone Limited* it was considered that the principle established by *Farrell v. Gallagher*, that the Act does not make the owner liable for any greater sum than he has contracted to pay (save in the case of wage-earners), is sound; but that case determines that, where the owner has agreed to make interim payments to the contractor as the work progresses, he is required by the Act to hold 20 per cent. of such interim payments as a statutory fund available for all lien-holders, and this fund is not answerable for any sum which the owner may claim against the contractor upon the completion of the work.

When, as here, there is but one payment called for by the contract, general lien-holders must take the situation as it is found to be, for there is no provision requiring the creation of a "statutory fund" for the protection of the lien-holders.

This fund is to be created by the owner deducting 20 per cent. "from any payment to be made by him in respect of the contract.*" When there is a lump-sum to be paid upon the completion of the contract and the work is not done, nothing is payable.

*Section 12 (1) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, is as follows:—

12.—(1) In all cases the person primarily liable upon any contract under or by virtue of which a lien may arise shall, as the work is done or materials are furnished under the contract, deduct from any payment to be made by him in respect of the contract, and retain for a period of 30 days after the completion or abandonment of the contract, 20 per cent. of the value of the work, service and materials actually done, placed or furnished as mentioned in section 6, and such value shall be calculated on the basis of the contract price, or if there is no specific contract price, then on the basis of the actual value of the work, service or materials.

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Where the case can be brought within the modern relaxation of the strict rule as to entire contracts now recognised in *H. Dakin & Co. Limited v. Lee*, [1916] 1 K.B. 566, and upon the taking of accounts upon the footing there recognised there is a balance due the contractor, the owner must retain 20 per cent. of this sum for possible lien-holders.

The appeal should be allowed and the actions dismissed with costs, to be taxed having due regard to the limitation found in the statute.

MEREDITH, C.J.C.P.:—I agree with my brother Middleton in the judgment which he has read: but I desire to state, so that there may be no room for misunderstanding, the facts upon which my opinion is based:—

The contract for the building of the house was in writing; the consideration for the doing of the work was single—one sum of money for the whole work; to be paid when the work was done: the work was never completed—in value over \$600 worth was never done, the whole price being only \$1,440; so that, under the special contract between contractor and owner, the contractor never became entitled in law to be paid anything; and it has long been the settled law of this Province, based largely upon the case of *Munro v. Butt* (1858), 8 E. & B. 738, that, under ordinary circumstances, in such a case as this, the builder cannot recover anything for the incomplete work done: nor does anything decided in the recent case of *H. Dakin & Co. Limited v. Lee*, [1916] 1 K.B. 566, conflict with that rule, though there may have been impressions that it did: on the contrary, the rule is recognised: what the Court of Appeal did in that case was: find, as a fact, that the work contracted to be done had been done, but defectively done in some details: so that, if fault could be found with that case, it should be with its finding of fact not its law.

The only question upon which my mind was not satisfied, at the argument of this appeal, was, whether the comparatively large payments made by the owner to the contractor, during the progress of the work, did not indicate a new agreement under which payments were to be made as the work progressed; but a careful examination of the whole of the proceedings, and of all the papers filed, since, has failed to discover any good ground for imputing any such subsequent agreement: see *Munro v. Butt*, *supra*.

So that the contractor could not now enforce, nor could he ever have enforced, in any legal proceedings, payment of any sum of money for the work done by him: but, during the progress of the work, the owner was subject to such pressure for payment as a threat to abandon the work if not supplied with some money to carry it on might have, if made: the Act, however, as it is, does not cover payments so made; payments which, if they had enabled the contractor to complete the work, would have made valid liens.

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BRITTON and LATCHFORD, JJ., also agreed with MIDDLETON, J.

Appeal allowed.

[APPELLATE DIVISION.]

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RE MASSEY-HARRIS CO. LIMITED AND CITY OF TORONTO.

Assessment and Taxes—Assessment of Manufacturing Company for Income—Temporary Investment in Dominion Government Bonds—Ascertainment of Amount of Assessable Income—Amount actually Received as Interest—Deductions—Assessment Act, R.S.O. 1914, ch. 195, secs. 2 (e), 11 (1) (b).

In December, 1917, a manufacturing company purchased from the Dominion Government "Victory" war bonds of the par value of \$1,780,700; the bonds were sold by the company in 1918; while the bonds were held, the company received interest amounting to \$49,393.47:—

Held, that this sum was "income," within the meaning of sec. 2 (e) of the Assessment Act, R.S.O. 1914, ch. 195, and the company was properly assessed for income, in respect of that sum, under sec. 11 (1) (b) of the Act. In ascertaining the amount of assessable income from the bonds, deductions were not to be made, as contended by the company, for discount received for payment in cash, "carrying charges," or loss on resale of the bonds. Decision of the Ontario Railway and Municipal Board reversed.

AN appeal by the Corporation of the City of Toronto from an order of the Ontario Railway and Municipal Board reversing the order of the Judge of the County Court of the County of York, upon an assessment appeal, and reducing the amount of the company's assessment in respect of income.

The reasons for the order of the Board, as given by the Chairman in writing, were as follows:—

This is an appeal by the Massey-Harris Company Limited against its assessment for the year 1919 for income on Victory war bonds.

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In December, 1917, the company purchased bonds of a par value of \$1,780,700; these bonds were sold by the company as follows:—

(1) April, 1918.....	\$ 430,000 par value.
(2) June, 1918.....	1,336,100 “ “
(3) March, 1918.....	14,600 “ “

\$1,780,700

While the bonds were held by the company, it received interest as follows:—

On \$ 430,000	December, 1917, to April, 1918.....	\$ 9,395.21
On 1,336,000	December, 1917, to June, 1918.....	39,963.95
On 14,600	December, 1917, to March, 1918....	34.31
		<hr/>
		\$49,393.47

The city corporation contends that the company should be assessed for this amount, \$49,393.47, as income.

The company submits that it lost on the transaction of purchase and resale, and was at cost for carrying charges while the bonds were held, and that this loss and outlay should be deducted from the gross receipts by way of interest in determining the quantum of its assessment as income. The Board is of the opinion that the company's contention is right.

The company is engaged in the business of manufacturing agricultural implements, and as such is taxed in respect of real estate and also business assessment under sec. 10 of the Assessment Act, R.S.O. 1914, ch. 195. Under sec. 11, sub-sec. (1), para. (b),* the company is assessed in respect of income from the war bonds referred to, as income not derived from the business in respect of which it is assessable under sec. 10. Indeed it is not denied that the company bought the bonds for the purpose of assisting in floating the Government loan, and not as a permanent investment, but with the intention of disposing of them as soon as opportunity offered. In respect of this transaction of purchase and sale the company is in no respect different from a financial

*11.—(1) Subject to the exemptions provided for in sections 5 and 10:—

(b) Every person although liable to business assessment under clause (f) of sub-section 1 of section 10 shall also be assessed in respect of the income derived by him from his business, profession or calling, to the extent to which such income exceeds the amount of such business assessment.

company whose sole business is dealing in bonds and other similar securities.

"Income," for the purpose of assessment, has been defined authoritatively by the Judicial Committee of the Privy Council in *Lawless v. Sullivan* (1881), 6 App. Cas. 373. As summarised in the report, p. 374, "the question decided in this appeal was whether upon the facts stated in the special case the appellant bank was or was not liable to be assessed under the local Acts in the sum of \$1,725 for taxes payable on the sum of \$46,000 being the amount of alleged income derived from its business within the city of St. John, in the Province of New Brunswick, during the year before, without taking into account certain losses which had accrued during that period, and which exceeded the income." At p. 378, Sir Montague E. Smith, delivering the judgment of the Board, says: "The Courts in Canada have in effect decided that 'income' means all the items of profit on the transactions of a business during the fiscal year, without regard to any losses arising from the same business during that year. Their Lordships cannot think that this is a sound or reasonable construction of the enactment." Again, at pp. 378, 379, that learned Judge is reported as saying: "There can be no doubt that, in the natural and ordinary meaning of language, the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces, and the proprietor can receive from it." Again at pp. 383, 384: "Their Lordships have come to the conclusion, upon consideration of the Act in question, that there is nothing in the enactment imposing the tax, nor in the context, which should induce them to construe the word 'income,' when applied to the income of a commercial business for a year, otherwise than in its natural and commonly accepted sense, as the balance of gain over loss, and consequently they are of opinion that where no such gain has been made in the fiscal year, there is no income or fund which is capable of being assessed."

In *City of Kingston v. Canada Life Assurance Co.* (1890), 19 O.R. 453, a Divisional Court adopted the above definition of "income" for the purpose of ascertaining the assessable income of the defendant company, under the Assessment Act as it then stood.

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The Assessment Act applicable here contains an interpretation clause: sec. 2 (e). This clause first defines "income," and then illustrates its meaning by concrete cases, and may for the purpose of this opinion be summarised thus: "Income" shall mean annual profit or gain: (1) whether ascertained as being wages, salary, or other fixed amount, or (2) unascertained, (a) as being fees or emoluments; or (b) as being profits from a commercial or financial business. The definition with illustrations ends at the semi-colon in the 11th line, and then proceeds with this declaratory clause: "And (income) shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source."

It is to be noted that "profit or gain" is the key-note of this interpretation clause. It begins by defining "income" to mean "annual profit or gain," and ends by declaring that "income" shall include "profit or gain from any other source," thus shewing that the Legislature had no intention to import into the word "income," as defined by it, a meaning at variance with that declared by the Privy Council in *Lawless v. Sullivan*. It seems to the Board that whichever member of the interpretation clause is held to be applicable in this case, the "income" assessable against the appellants is the quantum of gain or profit derived from this transaction of purchase and sale within the calendar year ending on the 31st December, 1918. If the income to be assessed is the profits of a financial, commercial, or other business, it is clear that any loss sustained must be deducted. If the income to be assessed is the return by way of interest or dividend received during the fiscal year from money at interest upon any security or investment, cognizance must be taken of losses sustained during that year in connection with the sale and disposal of that security or investment.

The appellant company has submitted a statement shewing a net loss of \$16,634.73, made up as follows:

Loss of principal on resale.	\$ 5,481.87
Carrying charges, being interest paid to bank	38,861.00
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	\$42,342.87
Interest received on account bonds.	\$25,708.14
	<hr/>
Net loss on bonds.	\$16,634.73

An order will issue in accordance with the view of the law above laid down. It is to be observed, however, that there is a discrepancy between the figures first set out as the interest claimed by the respondent to have been received—some \$49,393 47—and the interest alleged by the appellant in the above tabulated statement to have been received, namely, \$25,708.00. Not having the precise dates of sale of the several blocks of bonds, the Board is unable to determine which is the correct sum. The parties should check over the figures and so settle the amount, and, failing an agreement, they may speak to the Board further in the matter.

March 19. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

C. M. Colquhoun, for the appellant corporation, argued that it was a question of what the income of the respondent company was, under sec. 11 (1) (b) of the Assessment Act. "Income" is defined in sec. 2 (e) of the Act; and the County Court Judge was right in finding that the respondent company should be assessed on the amount received by it as interest on the "Victory" bonds purchased by it. The Board based its judgment on the case of *Lawless v. Sullivan*, 6 App. Cas. 373; but the decision in that case should not govern the case at bar. He referred to *Scottish Provident Institution v. Commissioner of Taxes*, [1901] A.C. 340, and the definition of "income" given by Bramwell, B., in *Regina v. Commissioners of Port of Southampton* (1870), L.R. 4 H L. 449, at p. 472.

J. M. Hossack, for the respondent company, argued that the point at issue was purely a question of fact, and that the definition of "income" adopted by the Municipal Board was correct.

Colquhoun, in reply.

April 4. MEREDITH, C.J.C.P.:—Debatable questions sometimes arise—more frequently perhaps among politicians—whether a certain item should be treated as interest or income or as principal or capital; but no such question really arises in this case: upon the admitted facts there is really no ground for reasonable contestation.

The company, the business of which is the manufacture of agricultural implements, bought, as every other company and

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person able to buy also bought, "Dominion Victory Bonds of 1917." there was the double inducement: an excellent investment and an aid to victory in the great war.

The company is assessed, for municipal taxation, as a manufacturing concern, in respect of its business as such: and is assessed also for income upon its investments in these Victory bond; and necessarily so assessed in compliance with the provisions of sec. 11 (1) (b) of the Assessment Act; so that the only question there can be is as to the proper amount of such assessment.

The amount actually received as interest upon the company's investment in these bonds was found by the County Court Judge to have been \$49,393.47; and that sum has been treated throughout as the proper amount.

But the company contends that a greater amount should be set off against it, rendering it not liable to assessment for any sum, though its actual income from the bonds was in fact the \$49,393.47.

The bonds were purchased, under the common terms, from the Dominion: the terms, with which every one should be familiar, were: all purchases at par, payment by instalments extending over the first six months of the life of the bonds; with, however, a right to pay the full price on the day fixed for payment of the first instalment, and to be allowed a discount on that payment, which would put the purchaser in the same position, in regard to the investment, as if he had paid by instalments: no better and no worse off in regard to income or interest.

The company paid for part of their bonds in one way and the rest in the other; and seem to me to have wasted a good deal of time, and many words, upon a contention that the discount received, for the payment in cash, should be credited to capital, not to income, and that, to that extent, the \$49,393.47, actually received as income, should, as item number one, be reduced. But neither in form nor in substance was the discount anything but interest: interest paid by the Dominion in advance for the use of the company's money from the time it was paid until the time when it must have been paid under the ordinary, the instalment, plan.

Then, as item number 2, it was contended that there should be a deduction for "carrying charges" of \$38,861, that is, for interest

which might have been paid by the company if it had not the capital but was obliged to borrow the money to pay for the bonds: but there is no evidence of any such need or any such borrowing; if there had been, and especially if the bonds had been pledged for repayment of it, a necessary item of that kind might have been allowed, and might yet be allowed if there were any thing before us to shew that it could be proved. Borrowing by the company in carrying on its manufacturing business would not do; and it is hardly likely that this great concern had not capital of its own enough to carry the transaction.

Then, as item number 3, it was contended that a loss of capital on a resale of the bonds—said to amount to \$5,461.97—should be also set off against the income actually received. Not because it was in any sense a loss of income, but because it was a loss on the whole transaction; a contention which would have some merit if the assessment was on capital as well as income, but entirely without merit and without weight, as it seems to me, when the power to tax and the assessment are, each, on income only.

It was said that, if the company were a financial concern continually engaged in buying and selling bonds in this way, its net earnings on all transactions might be considered its income: but the first obvious answer to that is: it wasn't; and it may be added that for want of sufficient capital no company could be continuously engaged in such transactions: one was enough for this company: nor can I see how the nature or extent of the business done could turn a loss or gain of capital into a loss or gain of income. If this contention were right, all appreciation of value in stocks and bonds should be assessed as income; it could not make any difference whether they were sold or retained by the company—it was so much gain.

I would allow the appeal and restore the assessment made by the County Court Judge. The question is really one of interpretation of the Assessment Act.

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BRITTON, J., agreed with MEREDITH, C.J.C.P.

LATCHFORD, J.:—The contention of the appellant is that as a matter of law the Ontario Railway and Municipal Board should have determined that the \$49,393.47, received by the respondent

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as interest upon the Victory war bonds which it purchased, is income within the meaning of that term, as defined by sec. 2 (e) of R.S.O. 1914, ch. 195.

The decision of the Board was that in the purchase of the war bonds and their subsequent sale—both purchase and sale being effected in 1918—the company was in the same position as a financial institution whose sole business was dealing in bonds and similar securities, and that therefore only the quantum of gain or profit derived from the purchase and sale of the war bonds by the company during 1918 could be regarded as “income.”

Apart from the value as an advertisement resulting from such a large subscription, widely published as made for patriotic purposes by a company whose chief if not sole business is admitted to be the manufacture and sale of agricultural implements, the investment was not very profitable, although, upon the ascertainment recommended by the Board, it has been found, as counsel agree, that instead of a loss of \$16,634.73 there was a gain of \$7,049.60.

But, in my opinion, not only this latter sum, but the total interest received, is “income” within the meaning of the Assessment Act, and, as such, subject to taxation.

As applicable to this case “income,” by sec. 2 (e), “shall include the interest . . . directly or indirectly received from money at interest upon any security . . . or from any other investment”

The company received \$49,393.47 as interest directly received from money at interest upon the security of the Dominion of Canada, and from an investment—temporary, indeed, but still an investment.

I have perused the reports of the cases cited in the opinion of the Board, but, with great respect, I find them inapplicable.

I would allow the appeal with costs.

MIDDLETON, J., agreed in the result.

Appeal allowed.

[ROSE, J.]

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ELLIOTT V. COLTER.

Executors—Breach of Trust—Direction in Will to Create Trust Fund in Part by Sale of Company-shares—Sale not Made because not in Interest of Estate—Use of Dividends on Shares to Make up Fund—Agreement between Executors and Beneficiaries of Fund (Life-tenants and Remaindermen)—Ratification of Course Taken by Executors—Construction of Will and Agreement—Executors Acting “Honestly and Reasonably”—Trustee Act, sec. 37—Refusal to Pronounce Judgment for Administration—Rule 612.

The testator, who at the time of his death held shares of the par value of \$155,000 in the capital stock of a cement company and had other property of the value of about \$64,000, by his will provided for some legacies, and gave the residue of his estate to his executors in trust, amongst other things, “as soon as they can conveniently do so . . . to realise by the sale of sufficient stock of the . . . cement company . . . a sum that together with the value of any bank stocks or other good and sufficient securities . . . will make the sum of \$100,000,” and to invest the sum and pay the income quarterly to the plaintiffs during their lives, “the first of such payments to be made within three months after my decease.” After the payment of the legacies, the remainder of the estate, “consisting chiefly of shares of the cement company and of the sum of \$100,000 when it shall fall in,” was to be kept intact as long as the executors, in their discretion, should deem it advisable; and the income from such remainder was to go to the defendants other than the executors. The will was made in 1906, when the company was apparently prosperous; but before the testator’s death, in September, 1908, the situation had changed, the price of cement had fallen, the company had refused to sell at the reduced price, and had stored its product. Soon after the testator’s death, the executors, who had become directors of the company pursuant to the will, learned that the supply of marl from a certain tract upon which the company depended for material for making cement was nearly exhausted. In 1910, 1911, and 1912, better prices for cement were obtained, and the company sold at a profit and paid dividends. The executors sold no shares, deeming that to sell would injure the company and would not be for the advantage of the estate, but they invested and added to the capital in hand (\$64,000) the dividends they received in 1910, 1911, and 1912; and by that means brought the fund up to \$91,500 in October, 1914, when an agreement was made between them and the plaintiffs and the other defendants, expressed to be executed in order to remove any doubt as to the right of the executors to use dividends for the purpose of building up the fund of \$100,000, and to ratify and confirm the action of the executors in so doing:—

Held, in an action for an account and for administration, that, upon the proper construction of the will and the agreement, the executors, in not selling the shares and in using the dividends as they did, had not been guilty of a breach of trust; if there had been a breach, it had been condoned by the agreement; and, if there had been a breach, and it had not been condoned, the executors had acted honestly and reasonably and ought fairly to be excused: Trustee Act, R.S.O. 1914, ch. 121, sec. 37.

Accordingly, an account could not be directed to be taken on the footing of a wilful default; and no sufficient reason had been shewn for taking the management of the estate out of the hands of the executors by pronouncing a judgment for administration: Rule 612.

Re McCully, McCully v. McCully (1911), 23 O.L.R. 156, 162, referred to.

ACTION by Jane A. Elliott and Eliza M. Tomlinson against the executors of the will of William George Elliott, deceased, and other persons interested in the estate of the testator, for an account of the executors’ dealings with the estate and for administration.

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March 18 and 19, 1918. The action was tried by ROSE, J., without a jury, at Brantford.

H. A. Burbidge, for the plaintiff.

W. S. Brewster, K.C., for the defendants the executors.

W. T. Henderson, K.C., for the defendants *Bridgeman et al.*, residuary legatees.

A. M. Harley, for the defendants *Dunster et al.*, other residuary legatees.

April 4, 1919. ROSE, J.:—The principal facts are stated by the parties by way of recital in their agreement dated the 30th October, 1914; the evidence at the trial merely supplements this statement. Some years before his death, the testator formed a company, called the Ontario Portland Cement Company Limited, for the purpose of manufacturing cement from marl to be taken from certain land which he had acquired for a small sum. The authorised capital stock of the company was \$450,000. Of this, \$225,000 was issued to the testator as payment for the property, and \$157,000 was issued to various subscribers, for cash. After payment of the expenses of the floatation there remained in the hands of the company about \$140,000 in cash, which was expended in the purchase of plant and machinery. A few additional shares seem to have been issued by the company, and the testator sold some of his shares, so that at the time of his death he held stock of the par value of \$155,000, and other shareholders had \$228,000. The executors still hold the \$155,000, less \$2,000 which they have transferred to legatees pursuant to the terms of the will.

In 1906, at the time of the making of the will, the company was apparently prosperous, and the testator, who thought that the supply of marl was good for many years, seems to have attached a high value to his shares. But before his death, in September, 1908, the situation had changed: competition had reduced the current price of cement, and the company, under the direction of the testator, had refused to sell at the reduced price and had stored what cement it manufactured. By the end of the year 1908 the company's storage space was full, and manufacturing ceased. About 1908 began the merger of various cement companies into Canada Cement Company Limited. The new company had no desire to acquire the assets of the Ontario company,

which was not to be feared as an active competitor, and which could be crushed at any time, if the Canada company chose to reduce still further the price of cement in the territory forming the market for the Ontario company's product. Soon after the death of the testator, the executors, who, pursuant to the will, joined the board of the Ontario company, learned from investigations made that the supply of marl, instead of being what the testator supposed, was nearing exhaustion. In 1910, 1911, and 1912 better prices were obtainable for cement, and the company was able to sell at a profit, and to pay dividends. Perhaps, during those years, the executors might have sold some of the shares held by them if they had been dishonest enough to conceal what they had learned about the impending exhaustion of their supply of marl, but no one can complain of their having declined to act dishonestly, and I think it is abundantly proved, not only that during the whole of the time that has elapsed since the death of the testator they honestly held the opinion, recited in the agreement of 1914, that to throw on the market any larger number of shares would cause the ruin of the company, but also that their belief was well-founded. I think that throughout they have pursued the course that was most in the interest of the estate, and I have no hesitation in finding that if, in fact, they have committed a breach of trust in not selling, they have acted honestly and reasonably and ought fairly to be excused: The Trustee Act, R.S.O. 1914, ch. 121, sec. 37.*

The basis for the claim that a breach of trust has been committed remains to be stated. After providing for some legacies, the will gives the residue of the estate to the executors in trust, amongst other things, "as soon as they can conveniently do so . . . to realise by the sale of sufficient of the capital stock of the Ontario Portland Cement Company Limited a sum that together with the value of any bank stocks or other good and sufficient securities held by" the testator "will make the sum

*37. If in any proceeding affecting a trustee or trust property it appears to the Court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, the Court may relieve the trustee either wholly or partly from personal liability for the same.

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of \$100,000," and to invest the fund and to pay the income quarterly to the plaintiffs during their lives, the first of the payments of income to be made within three months after the death of the testator. There are legacies of shares to two employees of the company, if they continue in the service of the company for two years, the testator expressing the opinion that it will be in the interest of the company and of his estate that these legatees shall continue to serve the company; there is a charitable bequest, and the remainder of the estate, "consisting chiefly of shares of the cement company and of the sum of \$100,000 when it shall fall in," is to be kept intact as long as the executors, in their discretion, shall deem it advisable; and the income from such remainder is to go to the added defendants. If the executors deem it advisable they or one of them shall go on the board of the company. It is argued that the direction that the first payment of income to the plaintiffs should be within three months after the death of the testator made it the peremptory duty of the executors to sell within the three months, notwithstanding the use of the words "as soon as they can conveniently do so." I will return to this point later on.

The assets of the estate, other than the shares of the cement company's stock, were of the value of about \$64,000. The executors thought that there was no object in trying to raise the remaining \$36,000 by a sale of shares, and so, beyond discussing the matter with a large shareholder, who said he would resign from the board if they attempted to sell, they made no offer of shares for sale; but, when the company resumed the payment of dividends, they invested, and added to the capital, the dividends that they had received. By that means they had brought the fund to something over \$91,500 by October, 1914, when the agreement before mentioned was entered into; and now the fund is \$97,000.

The construction of the agreement is not perfectly clear. It is expressed to be executed in order to remove any doubt as to the right of the executors to use dividends towards building up and creating the fund of \$100,000 and for the purpose of ratifying and confirming the action of the executors in so doing. After this declaration of its purpose, it witnesses that in consideration of the present plaintiffs and the present defendants the remainder-

men "agreeing to and confirming the action of the . . . executors . . . in so dealing with the dividends . . . instead of attempting to create said fund by selling and disposing of the capital stock," the said parties do "sanction, ratify, and confirm the several acts of the . . . executors . . . in using the dividends received by them . . . towards the providing and the creating of the said fund of \$100,000." For the plaintiffs it is argued that this means simply that the remaindermen sanction, ratify, and confirm the action of the executors in adding the dividends to the capital, instead of paying them to the remaindermen as income; while the executors contend that, reading the whole clause, it is clear that the plaintiffs ratified the action of the executors in not attempting to complete the fund by the sale of shares and in using the dividends instead of the proceeds of a sale: it is said that, even if the words of the ratification, taken alone, do not express more than a concurrence in the use of the dividends, the consideration is the agreement of the plaintiffs to confirm the action of the executors in not selling, but instead resorting to the dividends; and that the plaintiffs cannot withdraw that consideration and still hold the remaindermen to their consent to such use of the dividends.

At the trial I was at first inclined to take the plaintiffs' view of the meaning of the document, but further reflection has convinced me that that is too narrow a view, and that the real meaning is that the plaintiffs did ratify and confirm the course that had been followed; but, even if my present view is not the correct one, there is the question already mentioned, whether the executors had a discretion to refrain from putting the shares on the market. It is quite clear that what the testator had in mind was a sale of some only of his shares; the executors were to join the board of the company, if they thought it wise; they were to hold for two years a few shares, to be handed over to employees of the company if such employees remained so long in the service of the company; and the language of the will indicates that the testator looked upon the welfare of the company as equivalent to the welfare of his estate. I think it follows that when he directed the executors to sell some shares as soon as they could conveniently do so, he meant them to have regard not only to the possibility of getting money for the shares, but also to what was best for the company,

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and through it for his estate, and that he would not have thought it at all "convenient" to throw the shares on the market under the conditions that existed at the time of his death. Bearing in mind this general policy, which seems to be indicated by the will read as a whole, the direction to make the first payment of income within three months after the testator's death does not seem to make it necessary to read the first part of the clause as being "as soon as they can conveniently do so, but, in any case, within three months after my decease." It is not as if the whole fund was to be created by the sale of the shares: the executors had ready to hand interest-bearing securities of a value of \$64,000; doubtless some interest would be received by them within the three months; and I think the words "the first of such payments to be made within three months after my decease" are given the full meaning that under all the circumstances they can reasonably bear, if they are treated as requiring the executors to pay within the three months such income as might be derived within that period from the fund as then constituted. In no case could they have had, at the end of three months, a full quarter's income from the \$100,000 fund.

My conclusion, then, is that there has been no breach of trust; or, even if there has, it has been condoned by the agreement of 1914; or, if I am wrong as to the construction both of the will and of the agreement, that the executors ought fairly to be excused.

This makes it quite impossible for me to direct an account to be taken on the footing of a wilful default; and all that remains to be considered is whether there should be judgment for administration by the Court. It seems to me that no sufficient reason has been shewn for taking the management of the estate out of the hands of the executors. As far as I can tell, they have handled it wisely and have done well for the beneficiaries. The directors of the cement company, including the executors, have latterly been pursuing what seems to be the prudent policy of turning into cash the cement and other assets on hand with a view to a liquidation; and if there is no interference by the Court there seems to be a fair prospect of the completion of a proposed sale of the plant, which will be to the advantage of the estate as a whole. Apart from the lands and machinery, the company has some cash, some cement, and some investments in the war loan; its debts

are, apparently, very small, and nothing was said at the trial to indicate that it would be difficult to obtain the concurrence of the shareholders and of His Honour the Lieutenant-Governor in Council to an immediate distribution, under sec. 15 of the Ontario Companies Act, R.S.O. 1914, ch. 178, of a portion of these assets. If such a distribution was made, the executors would be able to complete the fund of \$100,000; and doubtless, if it can be made without prejudicing the negotiations for the sale of the plant, or otherwise injuring the company, the executors will try to have it made; but it would not be proper to take the estate out of the hands of the executors in the hope that an administration by the Court would have the effect of bringing about such a distribution, or the realisation, in some other way, of the \$3,000 required to complete the fund, for the benefit of the plaintiffs but to the disadvantage of the estate as a whole: see *Re McCully, McCully v. McCully* (1911), 23 O.L.R. 156, 162; and Rule 612.*

The action will be dismissed with costs.

The foregoing was written very soon after the trial, which was held in March, 1918; but, as it had been suggested that it might be to the advantage of the parties if judgment was not given until it was known whether, by the contemplated division of assets or by other means, the executors would soon be enabled to complete the fund of \$100,000, I caused notice to be given that, while the judgment was ready, it would not be then delivered unless the case was mentioned to me by the parties or one of them.

The matter stood in that way until February of this year, when, upon request, I granted an appointment and was attended by counsel for all the parties. Upon that occasion it was announced that the fund had been made up to the full amount of \$100,000; but counsel for the plaintiffs suggested a new issue by stating that he claimed that the estate was still indebted to the plaintiffs in respect of income, his point being that the moneys now in the hands of the executors, over and above the \$100,000, should be so distributed between the life-tenants and the residuary legatees as to compensate the former for the loss of income due to the deferred conversion of the shares, and that, for the purpose

*612. It shall not be obligatory on the Court to pronounce or make a judgment or order for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order.

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of determining what portion of the moneys now in the hands of the executors shall go to the life-tenants and what to the residuary legatees, the accounts ought to be taken upon the footing of the rule laid down in *In re Cameron* (1901), 2 O.L.R. 756.

Counsel for the residuary legatees took the position that this question was not properly raised at this stage of the case, or in this manner; and asked me to deliver judgment upon the case as presented at the trial. Some discussion ensued, and finally it was agreed that there should be a further postponement so that the figures could be looked into and counsel might confer and, if possible, arrive at a settlement of all the matters in dispute.

I am now informed that the effort to reach a settlement has been unsuccessful, and that it is necessary that judgment be given.

Counsel for the plaintiffs asks, in a written memorandum, that I deal with the question raised as to the right of the plaintiffs to a further payment on account of income; while counsel for the residuary legatees takes the position that the facts and circumstances necessary for the determination of that question are not all before the Court; he would be content, however, that Mr. Watts, one of the executors, should prepare a statement of such facts and circumstances, and that I should then deal with the matter as upon an originating motion, which he says is the proper procedure.

The question now raised by counsel for the plaintiffs is suggested in the reply which the plaintiffs delivered to the defence of the executors, in which the agreement of the 30th October, 1914, was put forward as a defence to the plaintiffs' claim; but the matter was not really gone into at the trial, the issue there being whether the plaintiffs were entitled to a judgment for administration, and whether, if they were so entitled, the accounts should be taken on the footing of wilful default; and it may well be that there are facts not yet given in evidence which are relevant to the issue now raised. Perhaps Mr. Watts could prepare a statement which all parties would accept as setting forth all such relevant facts, and perhaps he could not; at any rate, no such statement is now in existence, and I am by no means sure that by expressing a desire to proceed in the way suggested I should really bring the matter much nearer to the desired final settlement. It

appears to me, therefore, to be better to deal only with the issue which was raised at the trial and to dispose of that issue upon the facts developed at the trial, leaving open all other questions which there may be between the parties, and declaring that the judgment is without prejudice to the right to have those questions determined upon such proceedings as may be appropriate.

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Partnership—Solicitors—Misappropriation by Solicitor of Funds of Client—Liability of Nominal Partner—Holding out—Client not Dealing with or Relying upon Credit of Ostensible Member of Firm—Costs.

The defendant, a solicitor, was employed as a clerk by O., also a solicitor. At the suggestion of O., the defendant consented "to have his name in the firm," i.e., that the business of O. as a solicitor should be carried on under the firm name of O. & B., although B., the defendant, was not in fact a partner. The plaintiff was a client of O.; she entrusted moneys to him for investment; the relation continued after the defendant's name was used; but it appeared that the defendant had no control over the moneys received by O. from the plaintiff; that the moneys were not intended for any special investment, but were obtained by O. for such investment as he might decide upon; that the defendant did not hold himself out as a partner otherwise than by allowing his name to be used; and that the plaintiff was not induced to act or part with her funds by reason of such holding out, and did not in fact suffer loss thereby:—

Held, that the defendant was not liable for moneys of the plaintiff misappropriated by O.

Blair v. Bromley (1846), 5 Hare 542, and *Thompson v. Robinson* (1889), 16 A.R. 175, distinguished.

The plaintiff sued the defendant for money alleged to have been collected or received by the firm of O. & B.; the action was dismissed, but without costs, because the fact that the defendant's name appeared in the firm justified the plaintiff in making an investigation as to his real position.

ACTION for the recovery of \$5,332.23, in the circumstances mentioned below.

April 2. The action was tried by CLUTE, J., without a jury, at Hamilton.

T. R. J. Wray, for the plaintiff.

W. S. MacBrayne, for the defendant.

April 9. CLUTE, J.:—The plaintiff seeks to recover \$5,332.23 of money alleged to have been collected by the firm of Ogilvie &

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Brandon on account of the plaintiff. The defendant Brandon, who alone is sued, denies that he was in fact a partner of Ogilvie & Brandon, although his name appeared in the firm. The facts in the case are not in dispute, to any great extent.

The plaintiff is the widow of Albertus Johnston, who died on the 10th September, 1910.

The firm originally consisted of Publow & Ogilvie, solicitors. Prior to April, 1910, Publow had gone west, and had taken no active part in the firm's business.

The plaintiff's husband, during his lifetime, had done his business by way of investment exclusively with Ogilvie; and after her husband's death the plaintiff had continued to advise with and do her business exclusively with Ogilvie.

In or about the month of April, 1910, the new firm of Ogilvie & Brandon was formed, under the following circumstances. Ogilvie desired some one whom the bank would recognise as having authority, in addition to himself, to sign cheques, as a matter of convenience. Brandon was a solicitor; he came to Hamilton in 1909, and was employed by Publow & Ogilvie as their clerk at \$75 a month for three or four months. The firm then bought out the practice of Scott & Robertson, and Brandon's salary was raised to \$125 per month, beginning in 1910.

What took place when Brandon's name was taken into the firm is shewn from his examination on discovery, put in by the plaintiff:—

"225. Q. Did you reserve any control of the use of your name in the firm? A. Reserve any control?

"226. Q. Stipulate any way in which your name should be used in the firm of Ogilvie & Brandon? A. The firm of Publow & Ogilvie was dissolved through the action of Mr. Publow's father in stopping payment of Publow & Ogilvie's cheques. Publow & Ogilvie had a dissolution, before Harold Publow's death, and after Harold's death I understand that Mr. Publow senior objected to the financial settlement that Mr. Ogilvie was making of Harold's estate, and he took exception, I understand, although nothing was said to me direct, and he stopped payment of the cheques, and it became necessary for Mr. Ogilvie to have a new bank-account, and he said to me, 'How would you like to have your name in the firm?' and I said, 'I don't mind.' That is all that was said.

"227. Q. No stipulations were made at all as to the control of the name? A. No, that is how the firm was born."

The defendant continued to receive \$125 per month as before. He never became a partner or shared in the business. The business went on exactly as before. Mr. Brandon practically did all the work about the office, interviewed clients, and Ogilvie told him what to do. There was a bookkeeper in the office, and the defendant Brandon had nothing to do with the deposits or the cash-book. All moneys that were paid to Brandon, in his capacity as clerk, were handed to the bookkeeper, and they were deposited. He was paid \$125 per month till he left on the 1st July, 1911.

It appears from the evidence, and I find as a fact, that the plaintiff had the utmost confidence in Ogilvie, and trusted entirely to him in regard to her business, and not to Brandon. Ogilvie was her confidential adviser, both before and during and after Brandon's name appeared in the firm. Whatever holding out there may have been by Brandon to the public, that he was a member of the firm, the plaintiff never acted upon such holding out, and was not affected by it. She gave no business into Ogilvie's hands because Brandon was a member of the firm, nor did she remove her business from Ogilvie after Brandon ceased to be a member of the firm. There was no evidence, and it was not suggested, that the defendant Brandon had anything whatever to do with the transactions which resulted in a loss to the plaintiff, or that he in any way misappropriated any part of the funds which the plaintiff placed in the hands of Ogilvie for investment or otherwise.

Various sums received by Ogilvie from the plaintiff extend over the period from the 28th September, 1910, to the 27th June, 1911.

The plaintiff, in her statement of claim, charges that James Alexander Ogilvie and the defendant on or before the 10th September, 1910, carried on the business and profession of barristers and solicitors in partnership, under the name, firm, and style of Ogilvie & Brandon, which partnership continued down to the 1st July, 1911. She further charges that Ogilvie, in the course of the partnership business, wrongfully obtained from the plaintiff a transfer of nine shares of the capital stock of the Dominion Permanent Loan Company, and the proceeds thereof, amounting

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to \$450, were paid to the said Ogilvie firm on or about the 20th April, 1911.

With respect to this charge, the defendant personally had nothing whatever to do with it, and, unless by the mere fact of his name appearing in the firm during the time when Ogilvie wrongfully converted it to his own use, is in no way responsible for it.

The plaintiff further charges that between the 12th September, 1910, and the 1st July, 1911, the firm of Ogilvie & Brandon shewed to the plaintiff various parcels of real estate in the city of Hamilton, and upon the advice of the said firm the plaintiff paid or transferred to the said firm certain sums of money to be advanced or paid out by them on mortgages on the said parcels of real estate. Various sums are then mentioned, amounting in all to \$7,849.50, which, with the proceeds of the shares of the capital stock referred to, amounting to \$450, make \$8,299.50. It is admitted that certain investments were made out of these moneys, reducing the above amount to \$4,100; that two items, one of date the 28th September, 1910, \$150, and the other of the 19th May, 1911, \$300, for a monument, should be deducted from the amount claimed; and the difference would represent the amount which the plaintiff is entitled to recover, if any, with interest.

I find as a fact that the defendant did nothing to make himself responsible for these sums of money, or any part thereof, unless the fact of his name appearing in the firm makes him responsible. It may be mentioned that the firm's name also appeared on the sign at the office, and on the letter-heads used at the office.

The defendant alleges that the plaintiff's dealing was not with the firm of Ogilvie & Brandon, but with J. A. Ogilvie personally; and, if any sums of money were advanced by the plaintiff for any purpose, the said sums of money were advanced to the said J. A. Ogilvie.

The defendant was at no time a partner of the said J. A. Ogilvie, and the said defendant did not represent himself or knowingly suffer himself to be represented as a partner of the said Ogilvie, and the plaintiff did not give credit to the firm of Ogilvie & Brandon on the faith of such representation, but, on the contrary, the said plaintiff relied wholly and exclusively upon the said Ogilvie, in carrying out her transactions.

I find this defence, as pleaded, to be the fact.

The plaintiff referred to *Blair v. Bromley* (1846), 5 Hare 542. In that case, two solicitors having entered into a partnership, each of them continued to attend to the business of his former clients, but on the partnership account. One of the partners proposed an investment on mortgages, and the money was paid to the joint account of the partnership, at their bankers, for the purpose of investment. The investment was not made, but the partner by whom the proposal had been made to the client untruly represented to the client that the mortgage had been effected, and thenceforward continued to pay the interest as if it had actually been made. Although the banking account was kept in the name of the firm, the moneys standing to the account belonged exclusively to the partner who committed the fraud. He alone attended to and had the control of the account, and the fraud was unknown to the other partner. Five years after the receipt of the money from the client, the partnership was dissolved; and ten years after the dissolution of the partnership, the partner who had committed the fraud became bankrupt, and the client, who from the time of the dissolution until the bankruptcy had continued to employ him as his solicitor, discovered the fraud. On a bill filed by the client against the other partner to recover the money, it was held that the defendant was originally liable to the plaintiff, and that in equity the limitation in bar of the claim did not begin to run in favour of the defendant until the time when the client discovered the fraud. (Referred to in *Lindley on Partnership*, 8th ed., p. 191.)

The distinction between the *Blair* case and the present one is that an actual partnership existed between the solicitors.

It was there held that the Statute of Limitations would apply in an action at law, but not in equity.

The plaintiff chiefly relied on *Thompson v. Robinson* (1889), 16 A.R. 175. In that case R., a practising solicitor, was retained by the plaintiff to manage her business affairs, and he obtained from her and invested large sums of money in mortgage securities. A year afterwards R. entered into partnership with the defendant W., and the firm carried on business as solicitors and conveyancers, and had in their hands several estates to manage. It was agreed when this partnership was formed that W. should have no interest

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in the plaintiff's business, which continued to be managed entirely by R., but the entries in connection therewith were made in the books of the firm, moneys received on the plaintiff's account were deposited with the firm's moneys, and from time to time reinvested by the firm, or paid to the plaintiff or to R. by cheques of the firm, and charges paid by borrowers went into the profits of the firm. Held (Burton, J.A., dissenting), affirming the judgment of the Queen's Bench Division, and that of Boyd, C., at the trial, that under the circumstances, particularly because of the money having been actually received by the firm, and again paid out by them to the borrowers, both partners were liable for the negligence complained of. *Per* Hagarty, C.J.O.: The business being *prima facie* within the scope of the partnership business, W. was liable, and to escape liability he should, when the partnership was formed, have given notice to the plaintiff that he was not to be liable.

Osler, J.A. (p. 181), referring to *Harman v. Johnson* (1853), 2 E. & B. 61, quotes Crompton, J., as saying: "Attorneys may often become liable for similar acts of their partners, where the partnership is in the habit of carrying on business by what you may call a general commission; but they do not necessarily act under such a general commission." It was held in the *Harman* case that the receipt of money by one of the firm of attorneys from a client, professedly on behalf of the firm, for the general purpose of investing it, as soon as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney, so as, without further proof of authority from his partners, to render them liable to account for the money so deposited; such a transaction being part of the business of a scrivener, and attorneys, as such, not necessarily being scriveners. But, if money be deposited with one partner for the purpose of its being invested on a particular security, the other partners are liable to account for it, such a transaction coming within the ordinary business of an attorney." (Referred to in *Lindley on Partnership*, 8th ed., p. 200.)

Burton, J.A., in his dissenting judgment, thinks the law is well stated in the *Harman* case and in *Dundonald v. Masterman* (1869), L.R. 7 Eq. 504. "Where . . . money has been received by one member of a firm of solicitors in the course of the management and settlement of the affairs of a client of the firm,

such is money paid to the firm in the course of their professional business, and consequently the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of the parties by whom such money was received" (16 A.R. at p. 186).

In the present case it did not appear that the moneys sought to be recovered were received for any particular investment, although there was some reference to the plaintiff having been shewn parcels of land upon which the investment was made; but, owing to age and infirmity, her evidence could not be relied upon as a statement of definite facts, and this was in effect conceded by counsel.

The present case also differs from the *Thompson* case in this, that there was in fact no partnership. Although it was there agreed that W. should have no interest in the plaintiff's business, in that case charges paid by the borrowers went into the profits of the firm. Nothing of that kind existed in the present case.

Burton, J.A., did not agree with the learned Chancellor that in order to escape liability it was incumbent upon W. to give notice to the plaintiff that he would not be liable. Burton, J.A., says (p. 186): "He can be liable only on the ground that the actual agreement of partnership embraced transactions of this nature, or that he so conducted himself as to lead the plaintiff to believe that he was a partner in point of fact."

The present case is stronger in favour of the defendant than the *Thompson* case, because here it was not simply agreed that certain business should be particularly excluded from the partnership, but in fact no partnership existed.

Burton, J.A., further says (p. 187): "I do not for a moment dispute the point that if Robinson and Wilson were at the time of the retainer carrying on this description of business as partners, the mere fact that the plaintiff communicated exclusively with one member of the firm, or even refused positively to have anything to do with the other member, would not relieve them from responsibility; and I quite agree that in such a case she would not have been bound by any secret agreement between the partners."

Here the question of partnership is not disputed. It is perfectly clear that the plaintiff did not act upon any holding out of

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the defendant. She continued her business with Ogilvie as before, he being the sole partner in the firm. As to what constitutes a partnership, see *Mollwo March & Co. v. Court of Wards* (1872), L.R. 4 P.C. 419; Lindley on Partnership, 8th ed., p. 62 *et seq.*

In *British Homes Assurance Corporation Limited v. Paterson*, [1902] 2 Ch. 404, it was held, under the circumstances in that case, that the plaintiffs had elected to continue the employment of B. alone, and the defendant was not liable for B.'s fraud. See also *St. Aubyn v. Smart* (1867), L.R. 5 Eq. 183. In that case also an actual partnership existed.

See also Pollock's Digest of the Law of Partnership, 10th ed., pp. 51, 52. The learned author, after referring to some cases, says (pp. 52, 53): "The general principle on which the firm is held to be liable in cases of this class may be expressed in more than one form. It may be put on the ground 'that the firm has in the ordinary course of its business obtained possession of the property of other people, and has then parted with it without their authority'" (quoting from Lindley); "or the analogy to other cases where the act of one partner binds the firm may be brought out by saying that the firm is to make compensation for the wrong of the defaulting partner, because the other members 'held him out to the world as a person for whom they were responsible.' . . . The question is always whether the wrong-doer was acting as the agent of the firm and within the apparent scope of his agency. If the wrong is extraneous to the course of the partnership business, the other partners are no more liable than any other principal would be for the unauthorised act of his agent in a like case. . . . A more exact statement of the rule would be that the principal is not liable if the agent goes out of his way to commit a wrong, whether with a wrongful intention or not."

I am of opinion that the defendant is not liable for the loss suffered by the plaintiff. I think it clear from the evidence, and not in fact disputed, that the defendant was not a partner; that he had no control over the moneys received by Ogilvie from the plaintiff; that it does not appear that the moneys so deposited were intended for any special investment; but that the same were obtained by Ogilvie for such investment as he might decide upon; that the defendant did not hold himself out as a partner, otherwise than by allowing his name to be used; and, if that be con-

sidered a holding out to the public, the plaintiff was not induced to act or part with her funds by reason of such holding out, and did not in fact suffer loss thereby.

Although, in my opinion, the defendant is not liable, the fact that his name appeared in the firm justified the action of the plaintiff in investigating his real position in regard to the firm.

For this reason, I think that there should be no order as to costs.

Action dismissed without costs.

Clute, J.

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[APPELLATE DIVISION.]

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April 17

Mechanics' Liens—Claim of Assistant Architect Employed by Architect—Superintendence of Construction of Building—Drawing Plans—"Work" and "Service"—Mechanics and Wage-Earners Lien Act, sec. 6—"Contractor"—"Sub-contractor"—Sec. 2 (a), (f).

An assistant architect, employed by the architect of a building, who has been employed by the owner, is entitled under sec. 6 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, to a lien for his "work" and "service" upon or in respect of the building, in the drawing of plans and the supervision and direction of the construction of the building.

Arnoldi v. Gouin (1875), 22 Gr. 314, approved.

Per RIDDELL, J.—The architect was a "contractor" under sec. 2 (a), contracting with the owner for the "doing of work or service;" and the assistant was a "sub-contractor" under sec. 2 (f), employed by the "contractor."

AN appeal by the defendant Whitney from the judgment of the Assistant Master in Ordinary in favour of the plaintiff in an action to enforce a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140.

The plaintiff's claim was for services as an assistant architect in the erection of a building. The defendant Crane was the principal architect and was employed by the defendant Whitney, the building-owner.

March 31. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

J. H. Cooke, for the appellant, argued that the plaintiff had no right to a lien, as he did not fall within any of the classes referred to in sec. 6 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140. He was not a sub-contractor, but only an employee.

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A number of American cases cited in Wallace on Mechanics Liens, pp. 59 and 60, supported this contention.

J. M. Ferguson, for the plaintiff, respondent, argued that he was an associate architect, or a sub-contractor, entitled to a lien: *Arnoldi v. Gouin* (1875), 22 Gr. 314; *Davis v. Crown Point Mining Co.* (1901), 3 O.L.R. 69.

Cooke, in reply.

April 17. MEREDITH, C.J.C.P.:—The first question involved in this appeal is whether the respondent, an under-architect, employed by the architect for his own purposes, and not in any sense employed by the owner of the building erected, can have a lien, under the provisions of the Mechanics and Wage-Earners Lien Act, for the price of his professional services performed in that employment, upon that building.

The Act, sec. 6, gives to "any person who performs any work or service upon or in respect of . . . the . . . erecting . . . of any . . . building . . . for any owner, contractor or sub-contractor . . . a lien for the price of such work, service or materials upon the . . . building . . . and the land occupied thereby or enjoyed therewith, or upon or in respect of which such work or service is performed . . . limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner."

The words are quite wide enough to include the architect, who was employed by the owner, in regard to his work and services, as well upon the plans and specifications upon which the building was erected as for his work and services in superintending and directing the actual construction of it in accordance with them.

The general purpose of the Act, stated generally, is to give to those whose work or services or "materials" go, in the manner provided for in the Act, to the owner, in enhancement of the value of his land, security, as far as is just and practicable, upon the land and its improvements for payment for such work or services or materials.

The work or services of an architect are generally necessary in the construction of buildings and other works; not as necessary, in one sense, nor at all of the same character, as the work of a

hod-carrier, for instance, in buildings of brick; but often, if not always, profitable to the owner in the greater enhancement of the value of his property in the erection of a better building through the architect's skill and services; and, though his work is not of the afterwards visible mechanical character, it is none the less advantageous work done in erecting the building.

So too of the under-architect, if his work or services were performed for "owner, contractor or sub-contractor." They were not performed for the owner; but they were performed for a contractor: the word "contractor," as used in the Act, includes a person employed by or contracting with the owner "for the doing of work or service . . . for any of the purposes mentioned in this Act:" sec. 2 (a): and the architect was so employed; and the work and services of the under-architect were performed for him.

It would be different if the claim were for services or work done but not done in "*erecting*" the building, as, for instances, plans or specifications not used, a solicitor's costs for drawing contracts respecting the building, or advising as to legal points arising out of it, or, probably, for a watchman's services guarding the property.

It is not needful to refer to any of the cases upon the subject in the Courts of the United States of America, many of which are collected in the current omnibus legal work called "*Corpus Juris*;" and it is obviously dangerous to rely upon any of them without a thorough understanding of the statute-law upon which they are based.

Here we must start from these two grounds: at common law there was no such lien, and the fact that in the civil law there was, should only accentuate the point that the common law was against it: and that by statute-imposed injunction we are bound to give effect to the Act as a remedial enactment.

But one case in our own Courts has been referred to, and I know of none other: and that is one in which an architect's claim to be within the provisions of the Act, in respect of his work as an architect, was, on demurrer, upheld: *Arnoldi v. Govin*, 22 Gr. 314. That case was decided 44 years ago, and has, I believe, ever since been accepted as a well-decided case, whether one agrees, or does not agree, with all that was said in it. And since that decision the effect of the Act has been by legislation widened; that has been the whole trend of the various amendments of the Act.

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The learned Master who tried this case ruled in favour of a lien for the price of the under-architect's supervision and direction of the construction of the building in question; but against his claim upon the value of the plans prepared by him. In my opinion, he was right in the former and wrong in the latter ruling. Practically there could be no supervision, indeed no building, without plans and specifications.

The question as to the proper amount of the lien was little, if at all, discussed upon this appeal, probably because the amount involved, about which there could be any doubt, is small: and the architect who is primarily liable has not disputed the claim of the plaintiff as made in, as well as before, this action. Made up, without interest, by the plaintiff, it is \$1,340: made up according to the evidence which the letters which passed between the architects shews it is, without interest, \$1,250.

In these circumstances, the amount found to be due to the plaintiff by the Master cannot very well be changed.

I would, therefore, dismiss the appeal.

RIDDELL, J.:—This appeal in a mechanic's lien action from the judgment of Mr. Roche, the Assistant Master in Ordinary, raises a very curious and important question as to the effect of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140—10 Edw. VII. ch. 69.

The defendant, a theatre proprietor, desiring to rebuild a theatre building in Toronto, employed one Crane, an architect of Detroit, to draw the plans, supervise the construction, etc., for 5 per cent. of the cost. The plaintiff, a Toronto architect, was, according to the usual (if not universal) custom, employed by Crane to superintend the building and act as assistant architect, the remuneration being fixed at \$1,500 if the building cost \$125,000 and one and one-half per cent. of any excess cost.

The defendant Whitney and his manager knew that the plaintiff was so superintending the building etc. (at least in part), and knew that he was employed by Crane for that purpose.

A change being determined on in the front of the theatre, so that it would be two storeys instead of one, the plaintiff was instructed by Crane to draw the plans for the change. He did so, and these plans were used.

The building cost at least \$133,000. The plaintiff rendered his bill for.....	\$1,500.00
1½ per cent. of excess (\$133,000—\$125,000 = \$8,000).....	120.00
Plans.....	200.00
Travelling expenses to Detroit.....	20.00
	<hr/>
	\$1,840.00
The defendant Crane paid on account.....	500.00
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Leaving unpaid.....	\$1,340.00

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Crane not paying the plaintiff, he filed a claim for a lien for \$1,340. The Assistant Master in Ordinary allowed the claim, and the defendant appeals.

By the statute, sec. 6, it is provided that "any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting . . . or repairing of any erection, building . . . shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building . . . limited however" as in the said section set out.

The question is whether this can include the claim here made.

The present Act is rather wider than the original Act of 1873, 36 Vict. ch. 27—that, by sec. 1, gives a lien to "every mechanic, machinist, builder, miner, contractor, and other person doing work upon, or furnishing materials to be used in the construction," etc. But, even under that statute, it was held that one employed to act as architect and superintendent in the erection and construction of a building came within the protection of the Act: *Arnoldi v. Gouin*, 22 Gr. 314.

I think that case well decided. Whatever doubt there might have been had the language remained unchanged must, I think, disappear when all pretext for applying the *ejusdem generis* doctrine has disappeared; and, moreover, the words are now "work" or "service." I can see no reason why superintending the building is any less "service upon" the building than carrying bricks and mortar to the bricklayers, and I agree with the Vice-Chancellor (22 Gr. 315, 316) that drawing plans etc. is an essential thing "to be done in the construction of the work," and that he

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who draws such plans for a building "actually does work upon it as if he had carried a hod."

The work and services of the plaintiff, then, are such as are contemplated by the Act.

Crane is a "contractor" under sec. 2 (a), contracting with the defendant Whitney for the "doing of work or service;" and the plaintiff is a "sub-contractor" under sec. 2 (f), "employed by" Crane, "a contractor:" and there is no reason why he should not have a lien limited as set out in secs. 6 and 10.

The only item as to which there is any doubt is the \$20 expenses. The plaintiff says that Crane was to "pay expenses," and as to the \$20 he says:—

"Q. '\$20—expenses of trip to Detroit?' A. Yes, I didn't charge any time in going to Detroit, which I am entitled to.

"Q. You did go to Detroit? A. Yes.

"Q. At Mr. Crane's request? A. No, I don't think so.

"Q. Why did you go? A. Because I tried by writing and over the 'phone to get information in regard to the building, and I couldn't get it, and so I went to Detroit, and that is my expenses in regard to the matter."

It is difficult to make such a trip come under "service upon . . . a building;" and, while the plaintiff has a just claim against Crane for this sum, he should not claim it against Whitney—in this I agree with the Assistant Master in Ordinary.

But, as the Assistant Master in Ordinary says, when Crane paid the sum of \$500 on the account generally, without specific appropriation, the plaintiff had the right to apply the sum on any of the claims made; he did apply it to pay the \$20 (as well as the \$200), and I think he had the right to do so.

I would dismiss the appeal with costs.

BRITTON and LATCHFORD, JJ., agreed with RIDDELL, J.

Appeal dismissed with costs.

[IN CHAMBERS.]

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April 25

REX v. AVON.

Criminal Law—Keeping Disorderly House—Summary Trial and Conviction by Police Magistrate—Sentence to Imprisonment in Ontario Reformatory for one Year—Habeas Corpus—Motion to Discharge Prisoner—Objections to Procedure before Magistrate—Absence of Summons—Defendant Appearing and Pleading—Objection not Open on Habeas Corpus—Waiver—Power of Magistrate Exceeded in Sentence Imposed—Criminal Code, secs. 228, 773 (f), 774, 777, 781—Consequence of Imposition of Illegal Penalty—Refusal to Discharge—Amendment of Conviction by Reducing Term and Changing Place of Imprisonment—Powers of Court under secs. 1124 and 754 of Code—Proceedings before Court but not Brought up on Certiorari.

The defendant was convicted by a police magistrate of the offence of keeping a disorderly house, and was sentenced to one year's imprisonment in the Ontario Reformatory. Upon the return of a writ of *habeas corpus*, a motion was made for the discharge of the defendant, and the proceedings before the magistrate were brought before the Judge in Chambers, although no *certiorari* in aid had been issued. These proceedings were attacked on several grounds:—

- (1) It was said that, although the defendant appeared before the magistrate, was charged before him for the offence alleged, and pleaded to the charge, he was not duly summoned:—

Held, that this ground was not open upon a motion to discharge under a *habeas corpus*: the Judge in Chambers should not go behind the conviction; but, apart from this, it was not shewn that the defendant was at any disadvantage by reason of not having been properly summoned: it is competent for an accused to waive a summons and appear before a magistrate and plead, and when this is done he cannot upon conviction set up any defect in the procedure bringing him before the tribunal for trial.

- (2) As to the sentence: reading together secs. 228, 773 (f) (as amended by 5 Geo. V. ch. 12, sec. 8), 774 (as amended by 8 & 9 Edw. VII. ch. 9), 777, and 781 of the Criminal Code, if, instead of proceeding by indictment, the Crown chooses to proceed under Part XVI. of the Code, and to seek a summary trial of that which is an indictable offence, the accused will, by sec. 774, be precluded from objecting, and the jurisdiction of the magistrate to deal with the offence will be absolute, but the consequence of conviction will be the penalty found in sec. 781, which is different from that found in the section (228) creating the offence.

Rex v. Shing (1910), 17 Can. Crim. Cas. 463, followed.

- (3) The consequence of the imposition of an illegal penalty is not that the accused is entitled to his discharge.

Rex v. Shing, *supra*, not followed on this point.

Rex v. Crawford (1912), 20 Can. Crim. Cas. 49, followed.

The punishment being excessive, the Court or Judge had power to reduce it: secs. 1124 and 754 of the Code.

- (4) Although the conviction was not before the Court upon *certiorari*, the proceedings before the magistrate being in fact before the Court, the conviction should be amended so as to make it proper in form, by altering the sentence to imprisonment in the common gaol for 6 months, and upon this a proper warrant should be issued, and the defendant remanded in custody thereunder.

MOTION for the discharge of the defendant, who was imprisoned in a reformatory.

April 22. The motion was heard by MIDDLETON, J., in Chambers.

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R. L. McKinnon, for the defendant.

J. R. Cartwright, K.C., for the Crown.

April 25. MIDDLETON, J.:—Motion, on the return of a *habeas corpus*, for the discharge of Luigi Avon, convicted, by the Police Magistrate for the City of Guelph, for that he (the defendant) did on the 28th day of March, 1919, at Guelph, unlawfully keep a disorderly house, and upon which he was sentenced to one year's imprisonment in the Ontario Reformatory at Burwash.

No *certiorari* in aid has been issued, but the proceedings before the Police Magistrate are now before me.

The proceedings before the Police Magistrate are attacked on several grounds. The first ground relates to the proceedings anterior to the trial. It is said that, although Avon appeared before the Police Magistrate and was charged before him for the offence in question, and pleaded to the charge, he was not duly summoned.

In the first place, I do not think that this is a ground which is open upon a motion to discharge under a *habeas corpus*. Upon such a motion I do not think that I ought to go behind the conviction. If the conviction is one which is for an offence over which the magistrate had apparently jurisdiction, and the sentence is one within the competency of the magistrate, I think that ends the matter, so far as *habeas corpus* is concerned.

But, apart from this, I do not think that the case is properly made out. It is by no means clear how the accused came before the magistrate. He says that he was there as a witness in another case, and did not know that he was being charged with this offence. It appears that an information was duly laid, but it is not shewn that any summons was issued; when the accused appeared he pleaded, and the trial proceeded in apparently a perfectly fair way. I think it is quite competent for a person accused to waive any summons and to appear before the magistrate and plead, and when this is done he cannot upon conviction set up any defect in the procedure bringing him before the tribunal for trial. An attempt is made to shew that this is a case of an ignorant man who was not adequately protected from his own ignorance. This is entirely displaced. The accused had the assistance at the trial of an Italian who generally acted as interpreter, and who not only acts

as interpreter but as guardian and next friend of all his Italian fellow-citizens in the police court. The accused must have known that he was on his trial, for the charge was explained to him by this interpreter. The accused gave evidence on his own behalf, and was cross-examined upon it at length and called two witnesses on his behalf. The case is not one which admits of any doubt as to the guilt of the accused, for it is all too plainly established. One of the defendant's witnesses on cross-examination says: "Defendant keeps the house. The girls go there looking for a dollar. I had connection with this girl in that house Friday night." The accused seems to have had an idea that he could shield himself in some way behind his wife, and that it was enough to say, "I never got no money from nobody."

Another and a far more serious question arises as to the propriety of the sentence imposed. By sec. 228 of the Criminal Code "every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house." Under Part XVI. of the Code, relating to the summary trial of indictable offences, by sec. 773 (f), as amended in 1915 by 5 Geo. V. ch. 12, sec. 8, one charged with keeping a disorderly house under sec. 228 may be tried in a summary way; and sec. 774, as amended in 1909 by 8 & 9 Edw. VII. ch. 9, provides that the jurisdiction of the magistrate to try such a person is absolute and not dependent upon the consent of the person charged. Under sec. 777, in the case of other offences where a summary trial is sought, the accused, with his own consent, may be tried summarily, and in such case he is liable, if guilty, to the same punishment as he would have been liable to if he had been tried before the Sessions; but, by sec. 781, any person summarily tried *inter alia* under sec. 773 (f) may be committed for six months only in addition to being fined.

As I understand these provisions, read together: if, instead of proceeding by indictment, the Crown chooses to proceed under Part XVI. of the Code, and to seek a summary trial of that which is an indictable offence, the accused will, by sec. 774, be precluded from objecting, and the jurisdiction of the magistrate to deal with the case will be absolute, but the consequence of conviction will be the penalty found in sec. 781, which is different from that found in the section creating the offence, and which would be imposed in the event of guilt being found upon an indictment.

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This was the view of the Court of Appeal in Manitoba in the case of *Rex v. Shing* (1910), 17 Can. Crim. Cas. 463; and, although there are some minor changes in the statute since that date, I can find nothing which would lead me to any different view.

In the case referred to, the Court took the view that the consequence of the imposition of an illegal penalty was that the accused was entitled to his discharge. With this aspect of the matter I am quite unable to agree. The case of *Rex v. Crawford* (1912), 20 Can. Crim. Cas. 49, 6 D.L.R. 380, a decision of the Supreme Court of Alberta, dissents from *Rex v. Shing* in this respect. I think that the matter is plainly covered by the provision now found in the Code with regard to amendment. Section 1124 provides that upon conviction removed into the Supreme Court by *certiorari*, and it appearing that the punishment is in excess of that which might lawfully be imposed, the Court or Judge shall have the like powers to deal with the case as are provided by sec. 754 upon an appeal; and by sec. 754 it is provided that where the punishment is excessive the Court may reduce the sentence to one which the Justice might have imposed.

It is true that these powers are not given upon a motion to discharge on the return of a *habeas corpus*, but only on motion when the conviction is before the Court upon a *certiorari*. I think that the intention of the Legislature to prevent a guilty person escaping punishment by reason of an error of the magistrate should be given effect to, and that I should in an ordinary case delay dealing with the matter to allow the Crown to bring the conviction before the Court upon *certiorari*. Where, as here, the conviction and the proceedings before the magistrate are already before the Court, it would be idle to go through the form of sending them back to the magistrate to be brought here upon *certiorari*; and I think, therefore, that I should amend the conviction so as to make it proper in form, and so as to reduce the sentence imposed to imprisonment in the common gaol for 6 months, and upon this allow a proper warrant to be issued, and I should remand the accused in custody thereunder.

Under all the circumstances, I do not think that this is a case for costs.

[This decision was reversed by the Second Divisional Court of the Appellate Division, on the 13th June, 1919: see 16 O.W.N. 283. The reasons for the judgment of the Divisional Court will be reported in due course.]

[APPELLATE DIVISION.]

1919

April 28

WILLIAMS v. TORONTO AND YORK RADIAL R. W. Co.

Street Railway—Injury to Passenger Alighting from Street-car—Onrush of Passengers Entering Car—Duty of Street Railway Company—Terminal Stopping Place on Property of Municipal Corporation—Findings of Jury—Precautions to Ensure Safety of Passenger—Neglect of—Evidence—Proximate Cause of Injury.

The plaintiff, a passenger on a street-car of the defendants, attempted to alight from the car when it reached its terminus in the city of T., upon land of the city corporation. She was on the steps of the car on her way out when she was crowded and jostled by persons entering the car, was thrown to the ground, and injured. In an action for damages for her injury, the jury found that it was caused by the negligence of the defendants, consisting in "allowing passengers to enter at both doors," and that she was not guilty of contributory negligence:—

Held, that the defendants were bound to take reasonable means and care for the safety and comfort of the plaintiff during the journey, of which alighting from the car was a part; that the defendants were not exempt from doing their duty because the stopping place was not on their own property; that, no kind of precaution or care having been taken to prevent the wrong which was done, the jury's findings were reasonable and justified by the evidence; that the negligence found was the proximate cause of the injury; and that the judgment for the plaintiff entered thereon should be affirmed.

An appeal by the defendants from the judgment of LATCHFORD, J., in favour of the plaintiff, upon the findings of the jury at the trial, in an action for damages for personal injury sustained by the plaintiff by reason, as she alleged, of the negligence of the defendants.

The plaintiff, an elderly woman, when in the act of alighting from a car of the defendants, upon which she was a passenger, was jostled and thrown to the ground by passengers entering the car upon its arrival at the terminal stopping place of the defendants' cars at Sunnyside, in the city of Toronto.

The jury found that the plaintiff's injury was caused by the negligence of the defendants; that that negligence consisted in "allowing passengers to enter at both doors;" and that the plaintiff was not guilty of contributory negligence; and they assessed her damages at \$500, for which sum and costs judgment was directed to be entered in her favour.

April 28. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

D. L. McCarthy, K.C., for the appellants, argued that, as the place of termination of the car's journey was on city property,

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the appellants had no control over it, and so were not liable in damages for the injury to the plaintiff. The injury was caused by the misconduct of persons getting on or off the car, which misconduct could not have been foreseen by the defendants: *Eaton v. New York New Haven and Hartford R.R. Co.* (1917), 227 Mass. 113; *Toronto R.W. Co. v. The King*, [1917] A.C. 630, 38 D.L.R. 537. Counsel also urged that the answers of the jury were insufficient.

H. H. Dewart, K.C., for the plaintiff, respondent, was not called upon.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P.:—I am quite in accord with the learned trial Judge in all that was said by him, as to the law bearing upon this case, in the discussion which took place, at the trial of this action, after the case had gone to the jury, views of the law quite in accord with those expressed by Riddell, J., and expressed also in the cases referred to by him, in his comprehensive and lucid judgment written in the case of *Rex v. Toronto R.W. Co.* (1911), 23 O.L.R. 186, a judgment which upon an appeal to the First Appellate Divisional Court here met with the entire approval of that Court: *Rex v. Toronto R.W. Co.* (1915), 34 O.L.R. 589, 25 D.L.R. 586; and, though the case was overruled in the Privy Council, it was overruled upon a ground not in any sense involved in this case, and without anything being said in conflict with it in so far as it bears upon this case: *Toronto R.W. Co. v. The King*, [1917] A.C. 630, 38 D.L.R. 537.

It should not have been necessary to say more than that in dismissing this appeal, but for the contentions made by Mr. McCarthy, in which the rights of a street railway company were placed upon altogether too high a level and those of its passengers upon altogether too low an one, which contentions, it seems to me, should be met by expressed disapproval now, and for that purpose the circumstances of the case and the rights of the parties in them must be more fully stated.

The plaintiff was a passenger upon a street-car of the defendants, and under the contract between them they were bound to take reasonable means and care for her safety and comfort during the journey, of which boarding the car and alighting from it at her

destination was each a part. That she had paid for in the price she paid for her ticket.

Her destination was at the terminal point of the defendants' passenger car service at Sunnyside, in Toronto; and there, when endeavouring to alight in a proper and the usual manner, she was crowded and jostled by persons from a crowd which was awaiting the car and anxious to board it for its return journey: the effect of the onrush of such persons was to dislodge her from her position on the steps of the car on her way out, and she then fell to the ground and was injured, before her journey ended and whilst her contract with the defendants was in full force and effect.

It was urged that, as the defendants have no stations such as greater railway companies have, their liabilities are less; that the end of the journey of the car in this case was on the property of the Municipal Corporation of the City of Toronto, over which the defendants had no control; and, therefore, are not answerable in damages in this case. But the question of title is not one in which passengers are concerned: under the contract for safe carriage, boarding and alighting were included in the journey. And wherever cars are stopped for boarding or alighting that is made a station for such purposes, so that if an unsafe place be chosen the company must be answerable for the consequences caused by negligence in stopping there. In this case the defendants had the owners' leave to stop where they did, but were not under any compulsion or even agreement to do so: and that leave carried with it license to do all things that were necessary or proper to be done at this street-car terminus in receiving and discharging passengers—that was the purpose of the leave and license.

And, if that were not so, the wrong was done on the car; and no kind of precaution or care was taken to prevent it. To say that the defendants were powerless to prevent it, is to say that the jury's findings are wrong, and to say that to which no one can give credence.

If the defendants had made an attempt of any kind to have prevented the inexcusable rush upon their car, one might hear with more patience such excuse for misconduct which should not be tolerated anywhere. No attempt was made. There were two men—conductor and driver—in charge of the car, but neither made any attempt to enable the passenger to alight in safety; they

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seem to have vanished when their services were most needed; none of the witnesses were able to say where they were, and they were not called as witnesses for the defence at the trial; though the defendants were in great need of a satisfactory explanation of their absence, and the absence of any attempt to protect their passengers.

The jury thought that the simple, common method of receiving passengers at one door and discharging them at the other, was the proper method, and that it would have saved the plaintiff from injury: and I have no doubt other simple methods also would have been equally successful, such as one man at each door to see that there was safety in boarding and alighting: or, if it seemed necessary, the two men at the exit: less than two men have held a bridge. Indeed, however it is looked at, it was a case of gross neglect by the defendants of their duty towards their passengers, a neglect which was the proximate cause of the plaintiff's injury; and a neglect which they made no attempt to excuse or explain in evidence at the trial.

The contention that the jury's answers are not sufficient to support the judgment is already answered. The jury gave only one instance of negligence, when they might have given more; but one is enough if reasonable men could so find, and who can reasonably say that reasonable men could not find, upon the evidence adduced, that, if the defendants had adopted the common, simple, and easy practice of receiving at the back door and discharging at the front, on this occasion, when there were many passengers, if not always, that would not have given the plaintiff opportunity for alighting in safety? It is enough if reasonable men could so find, even though we might not agree in that finding; but I desire to add that I quite agree with the jury in it and should have added to it.

We all think that this appeal should be dismissed.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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Criminal Law—Offence against Orders in Council respecting Censorship—Publishing Objectionable Matter—War Measures Act, 1914, 5 Geo. V. ch. 2 (Dom.)—Information—Indictment—Nolle Prosequi—Criminal Code, sec. 962—Entry of Stay of Proceedings—New Information for Like Offence—Defendant not Put in Jeopardy under Indictment—Fresh Prosecution not Barred—Motion for Prohibition to Police Magistrate—Dismissal of—Appeal—Right of—Motion not Based on Want of Jurisdiction—Question for Consideration in Criminal Proceedings—Alternative Methods of Trial—Election of Crown to Proceed with Summary Trial before Magistrate—Second Application for Prohibition—Refusal—Discretion—Appeal—Construction of secs. 2 and 10 of Act—Authority for Orders in Council—Lawful Exercise of Jurisdiction of Magistrate—Refusal to Prohibit—Power to Prohibit—Discretion—Remedies under Criminal Code.

In March, 1918, an information was laid against the defendant charging him with an offence against a Dominion order in council, made under the War Measures Act, 1914, 5 Geo. V. ch. 2 (Dom.), by having in his possession, or publishing, objectionable matter, to wit, a book intituled "The Parasite." The defendant claimed a right of trial by jury, which was conceded by the Crown. The defendant was committed for trial, and an indictment was found against him by the grand jury. In November, 1918, further proceedings upon the indictment were stayed, by direction of the Attorney-General, under sec. 962 of the Criminal Code—in effect by the entry of a *nolle prosequi*. In December, 1918, a new information was laid against the defendant, substantially to the same effect as the first information, and the defendant was brought before a magistrate. A preliminary objection was raised and a motion made by the defendant for an order prohibiting the magistrate from proceeding upon the new information:—

Held, by SUTHERLAND, J., in Chambers, dismissing the motion, that the stay directed upon the indictment was not a bar to the second information, the defendant not having been put in jeopardy upon the first.

Upon appeal by the defendant from the order of SUTHERLAND, J., it was *held*, by a Divisional Court of the Appellate Division, that the motion was properly dismissed, the jurisdiction of the magistrate not being attacked.

Per MEREDITH, C.J.C.P.:—The defendant had the right to appeal from the order dismissing the motion for prohibition; but the question considered upon the motion was not one of jurisdiction; it was a question for consideration in the criminal proceedings, and there only.

After the decision of the appellate Court, the Crown having elected to proceed with a summary trial before the magistrate, the defendant again moved for an order prohibiting the magistrate from proceeding upon the information, upon the grounds that he had no jurisdiction under the War Measures Act, or the orders in council respecting censorship, to try the defendant, and that the defendant was entitled to a trial by jury:—

Held, by MASTEN, J., in Chambers, that a second motion for prohibition should not, in the circumstances, be entertained; and that the lack of jurisdiction did not appear with sufficient clearness to warrant the issue of an order of prohibition; and, in the exercise of a proper discretion, the motion should be refused.

Held, by a Divisional Court on appeal from the order of MASTEN, J., that, assuming that the Court had power to prohibit the magistrate from trying the case summarily if it was not lawful for him to do so, that power ought not to be exercised, because it was lawful for the magistrate, and he was in law bound, so to try it.

Meaning and effect of secs. 6 and 10 of the War Measures Act, 1914, and of orders II. and III. of the Consolidated Orders respecting Censorship, made thereunder, considered.

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Rex v. West (1915), 34 O.L.R. 368, 35 O.L.R. 95, referred to.

If the Court had no power, that ended the matter; if it had power, and a discretion, no sufficient reason was shewn why the case should not be left to take the ordinary course of a criminal case under the Criminal Code.

If the magistrate was wrong in considering that the case could be summarily tried against the will of the defendant, ample provision was made in the Code for relief in several ways.

MOTION by the defendant for an order prohibiting one of the Police Magistrates for the City of Toronto from taking any further proceedings under a certain information, on the ground that the charge therein was for the same matter as that in respect of which the defendant had been indicted and thereafter discharged, after an entry of a stay of proceedings thereunder, by the direction of the trial Judge at a sittings in Toronto—the direction having been given at the instance of the Attorney-General for Ontario, with the approval of the Minister of Justice for Canada.

January 28. The motion was heard by SUTHERLAND, J., in Chambers.

W. E. Raney, K.C., for the defendant.

Edward Bayly, K.C., for the Crown and the Police Magistrate.

March 1. SUTHERLAND, J.:—This motion arises out of a prosecution under a Dominion order in council made, established, or enacted under the War Measures Act, 1914, 5 Geo. V. ch. 2 (Dom.), the accused being charged with having in his possession, or publishing, objectionable matter, to wit, a book intituled "The Parasite."

An information was laid in the Police Court in the city of Toronto, in March, 1918. The accused, when the matter came on for preliminary hearing before the Police Magistrate, claimed a right of trial by jury. It was said during the argument, by counsel representing the Crown, that the Crown could legally have insisted upon a trial by summary proceedings. In the end this was not pressed or definitely determined, but it was arranged or conceded that the request or claim of the accused should be complied with. A committal was made and in due course followed by an indictment, upon which a true bill was found. Some correspondence passed between the Departments of Justice at Ottawa and of the Attorney-General at Toronto and the counsel for the accused as to whether the charge should be brought to trial under existing circumstances.

Upon the argument it was urged on behalf of the accused that the conclusion arrived at on the part of the Crown was indicated

in a letter from the Minister of Justice to the Attorney-General, bearing date the 30th April, 1918, and in part as follows:—

“That if, in his opinion, the circumstances would justify the entry of a *nolle prosequi* this Government would not insist on further prosecution.”

Thereafter the matter came on before Masten, J., at the jury sittings at Toronto, on the 15th November, 1918. The Crown was represented by Mr. T. J. Agar, and the accused by Mr. Raney, K.C. The former intimated to the Court—as the material upon which this motion is made shews—that under instructions from the Attorney-General he desired “to have a direction to the officer of the Court to make a record, or entry, that further proceedings are stayed by the direction of the Honourable the Attorney-General under section No. 962 of the Criminal Code.”

The said section is as follows:—

“The Attorney-General may, at any time after an indictment has been found against any person for any offence and before judgment is given thereon, direct the officer of the court to make on the record an entry that the proceedings are stayed by his direction, and on such entry being made all such proceedings shall be stayed accordingly.

“(2) The Attorney-General may delegate such power in any particular court to any counsel nominated by him.”

Thereupon the following discussion took place:—

“His Lordship: Does anybody appear for the defendant?

“Mr. Raney: I appear for Mr. Spence, my Lord.

“His Lordship: Do you prefer to have a jury called and a verdict of ‘not guilty’ entered, or are you satisfied with what is suggested?

“Mr. Raney: I would waive that, my Lord. I desire to say in justice to Mr. Spence, and to avoid any misapprehension, that he is here regretting nothing, retracting nothing, and that he is prepared to take his trial before a jury. Of course that now becomes unnecessary in view of the action of the Crown. I waive, therefore, the formality of the empanelling of a jury.

“His Lordship: Is there a form?

“Mr. Agar: Nothing more than a direction given to the officer of the Court to put on record an entry that further proceedings are stayed by direction of the Attorney-General.

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"His Lordship: Very well, that disposes of it."

The following endorsement was then made upon the indictment:

"Further proceedings stayed by direction of the Attorney-General, under sec. 962 of the Code." This was signed by the presiding Judge.

In the month of December, 1918, a new information was laid against the accused for "publishing a book called 'The Parasite' containing objectionable matter." It is admitted on the part of the Crown that this is in substance similar to the first mentioned information.

Upon the accused appearing in answer thereto before the Police Magistrate on the 18th January, 1919, and being asked to plead, a preliminary objection was taken by his counsel, Mr. Raney: it appears in an abstract of the proceedings filed on the motion, from which I quote as follows:—

"Magistrate Kingsford: Mr. Childs (speaking to the reporter), please take this down: 'The defendant's counsel before pleading raises a preliminary objection that the defendant has already been committed for trial on the 18th March, 1918, on the same charge on which he is now being prosecuted.'

"Mr. Raney: And that under the charge he was indicted at the instance of the Crown on Monday the 6th May, 1918, and a true bill found before the grand jury of this county.

"Magistrate Kingsford: What happened then?

"Mr. Raney: On the 15th November, 1918, the defendant appeared at the Assize Court in Toronto, when a stay of proceedings was directed by Mr. Justice Masten, the trial Judge, on the application of the Crown counsel, under instructions from the Attorney-General; and that stay of proceedings was, I submit to this Court, an end of the prosecution, a stay of all proceedings in respect of this charge."

Mr. McFadden, who appeared for the Crown, on being asked if he agreed that the facts were as stated in the preliminary objection, said: "That is my understanding of the facts, that a stay of proceedings was directed in this particular case."

The abstract proceeds as follows:—

"Magistrate Kingsford: The counsel for the prosecution admits that the statement of the facts contained in the preliminary objection above set out, is correct. I would like to hear from you,

Mr. McFadden, as to how you still contend that this prosecution can go on."

Mr. McFadden replied, among other things, as follows: "I submit that a stay of proceedings entered in such a way is no bar to a fresh charge being made, or a fresh indictment."

Thereupon the magistrate said: "I intend to direct that a plea of 'not guilty' be entered, and I intend to allow you at once to move to prohibit me from going on with the case. All the material which you wish to use before me can properly be used before the Superior Court, and all the technicalities you wish to raise before me can be properly raised in the Superior Court, so I now direct that a plea of 'not guilty' be entered."

Upon this motion an order is sought to be obtained prohibiting R. E. Kingsford, Junior Police Magistrate for the City of Toronto, from taking any further proceedings under the last mentioned information, on the ground that the charge therein is for the same matter as that in respect of which the defendant was indicted and thereafter discharged after an entry of a stay of proceedings thereunder by the direction of the trial Judge at the sittings of the Assize Court at Toronto, the said direction of the trial Judge having been given at the instance of the Attorney-General for Ontario, with the approval of the Minister of Justice for Canada.

The Attorney-General formally exercised his power to stay proceedings by entering a *nolle prosequi*. Now he does this under the authority of and in the manner indicated in the said section, 962, of the Code.

In *Goddard v. Smith* (1705), 6 Mod. 261, 262, it was held that a *nolle prosequi* does not discharge the crime; it only puts the defendant without day; and therefore the Attorney-General may issue other process on the indictment; but an acquittal goes to the fact charged.

In Archbold's Practice of the Crown Office (1844), p. 62, it is said: "The Attorney-General, or, in the vacancy of that office, the Solicitor-General, may at any time order a *nolle prosequi* to be entered; which has the effect of putting an end to the prosecution altogether."

In *Regina v. Allen* (1862), 1 B. & S. 850, it was held that the Attorney-General had power to enter a *nolle prosequi* on an indictment without calling upon the prosecutor to shew cause why

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that should not be done; and that, on the prosecutor thereafter moving for a ruling calling upon the defendant to shew cause why the prosecutor should not be at liberty to proceed to the trial of the indictment, notwithstanding the *nolle prosequi*, the Court would not interfere. At p. 854, Cockburn, C.J., says: "No instance has been cited, and therefore it may be presumed that none can be found, in which, after a *nolle prosequi* has been entered by the fiat of the Attorney-General, this Court has taken upon itself to award fresh process or has allowed any further proceedings to be taken on the indictment." And again at the same page: "Our attention has been called to the practice of Attorney-General in his office, as laid down in the books, to summon the prosecutor, and hear the parties before granting his fiat for a *nolle prosequi*. I think that is a wholesome practice; and generally the law officer of the Crown, before entering a *nolle prosequi* either *ex mero motu* or at the instance of the defendant, and thereby debarring the prosecutor from proceeding further, would act wisely in calling the prosecutor before him; but, from particular circumstances known to him, or from the nature of the charge, he may feel called upon to grant his fiat for a *nolle prosequi* without adopting that course. Suppose it possible that there could be an abuse of his power by the Attorney-General, or injustice in the exercise of it, the remedy is by holding him responsible for his acts before the great tribunal of this country, the High Court of Parliament. I have no doubt that the Attorney-General has this power; and this Court has never interfered with it." And Crompton, J., after quoting (p. 855) the extract from Mr. Archbold's work referred to, and after making reference to what was decided in *Goddard v. Smith*, proceeded to say (p. 856): "The Court, in the course of the argument, said that the Attorney-General might issue new process upon the indictment; but, as I have said, I rather think the *nolle prosequi* puts an end to the prosecution." Blackburn, J., said (pp. 856, 857): "I do not express an opinion whether, after a *nolle prosequi* has been entered, the prosecutor can proceed with a fresh indictment. But the power of determining whether the prosecution of an indictment shall go on or not, is entrusted to the Attorney-General, who is the great law officer of the Crown; and whether he is right or wrong this Court cannot interfere."

In the 13th edition (1856) of Mr. Archbold's well-known work on Criminal Pleading and Evidence, at p. 94, the author says:

"A *nolle prosequi* does not operate as an acquittal; the party remains liable to be re-indicted, and it is said that even fresh process may be awarded on the same indictment: 6 Mod. 261."

In the 16th edition (1867), however, the author says, at p. 101, referring to the statement that fresh process may be awarded on the same indictment, that "this *dictum*, however, appears not to be law. See the judgment in *Regina v. Allen*, 1 B. & S. 850, 31 L.J. (M.C.) 129; *R. v. Mitchel*, 3 Cox C.C. 93; and Archbold's Crown Office Practice, 62."

In the 24th edition of the same work (1910), at p. 146, the author says: "A *nolle prosequi* puts an end to the prosecution . . . but does not operate as a bar or discharge or an acquittal on the merits; . . . and the party remains liable to be re-indicted. It has been said that fresh process may be awarded on the same indictment; . . . but this *dictum* appears not to be law." The cases already referred to are cited, and in addition, on the point that a *nolle prosequi* puts an end to the particular prosecution, *Gilchrist v. Gardner* (1891), 12 N.S.W. Rep. (Law) 184, is cited. In that case it was held that where "the declaration, in an action for malicious prosecution, stated that the plaintiff appeared and was tried upon a certain charge at a Court of Quarter Sessions, that the jury failed to agree to a verdict, and that the Attorney-General thereupon declined to proceed further against the plaintiff, who was discharged," it was "a sufficient allegation that the proceedings had terminated in the plaintiff's favour."

At p. 187, the Chief Justice said: "It seems to me, therefore, that a *nolle prosequi* entered by the Attorney-General in a criminal case has the same effect as the entry of a *nolle prosequi* by the plaintiff in a civil case. It puts an end to that particular matter. A plaintiff may before judgment enter a *nolle prosequi* and put an end to the action, but he may afterward commence *de novo* upon the same cause of action. So the entry of a *nolle prosequi* by the Attorney-General puts an end to that prosecution, though he may afterwards cause a fresh prosecution to be commenced." And Windeyer, J., at the same page, says: "The prosecution may be commenced anew, and a fresh indictment may be filed, but it does not follow from that that the entry of a *nolle prosequi* to the first indictment should deprive a person who feels himself aggrieved thereby of his action for malicious prosecution."

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In Cyc., vol. 12, p. 374, this general statement as to the law is made: "By the weight of authority, in the absence of a statutory provision to the contrary, but in some jurisdictions by leave of the court only, a *nolle prosequi* may be entered by the prosecuting officer at any time before judgment, with or without defendant's consent, although if it is entered without defendant's consent after the jury has been impanelled and sworn, and the indictment is sufficient, jeopardy has attached, and in most States he cannot be again put upon trial for the same offence."

And at p. 261 of the same volume, dealing with the time when jeopardy attaches, this statement appears: "The submission of an indictment to the grand jury and the examination of witnesses before them, or even the finding of the indictment, does not amount to a putting in jeopardy; but the accused is placed in jeopardy where he has pleaded and has been put on trial before a court of competent jurisdiction upon an indictment valid and sufficient in form and substance to sustain a conviction, and the jury has been sworn and impanelled and charged with the case. Jeopardy does not attach until an issue has been joined; and therefore a defendant has not been in jeopardy where he has not pleaded or where he has been permitted to withdraw his plea."

In vol. 26, at p. 60, this statement appears: "There are authorities holding that an action of malicious prosecution will not lie on the entry of a *nolle prosequi*. The greater weight of authority, however, is that it is a sufficient termination of the prosecution to authorise defendant to sue for malicious prosecution, when entered with the consent of the court, for reasons other than an irregularity or informality in the indictment, and when not entered at the instance or with the consent of defendant."

In Halsbury's Laws of England, vol. 9, para. 350, the law is thus stated: "Proceedings on an indictment may be stayed at any time after the finding of the indictment and before judgment by the entry of a *nolle prosequi*, which can only be entered by the authority of the Attorney-General. The effect of this is that all proceedings on the indictment are stayed, and the defendant, if he is in custody, is discharged, but may be indicted afresh on the same charge."

In *Rex v. Marsham, Ex p. Pethick Lawrence*, [1912] 2 K.B. 362, an accused person was convicted by a magistrate of assaulting a

constable in the discharge of his duty, but inadvertently upon the hearing the evidence of the constable was taken without his being sworn. The attention of the magistrate being called to this irregularity, he, upon the same day reheard the case, all the evidence being then given upon oath. He again convicted the accused. A rule having been obtained to quash the second conviction upon the ground (among others) that it was bad in that the applicant at the time of the conviction had previously been put in peril in respect of the same offence, it was held that, as he had not been legally convicted on the first hearing, he had not been put in peril at the time of the second hearing, and the second conviction was therefore good.

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In *Regina v. Mitchel* (1848), 3 Cox C.C. 93, it was held "that an Attorney-General is at liberty, after having entered a *nolle prosequi* on an indictment, to file an *ex officio* information for the same offence; and that in prosecutions for crimes the pendency of an indictment or information is not a good plea to an information, subsequently filed against the same party for the same offence."

In *Regina v. Drury* (1849), 3 C. & K. 193, it was held that "where a judgment is reversed on writ of error, the prisoner cannot plead *autrefois acquit* or *autrefois convict* in bar; he never having been in jeopardy in that case, and a judgment reversed being the same as no judgment."

In *Regina v. Green* (1856), 7 Cox C.C. 186, where there was a "plea of *autrefois acquit* to an indictment for larceny, the former acquittal having taken place on the ground that the property was laid in the wrong person," it was held "that a plea of *autrefois acquit* to that second indictment could not be sustained."

In *Baxter v. Gordon Ironsides & Fares Co. Limited* (1907), 13 O.L.R. 598, it was held that "an action for malicious prosecution, founded upon criminal proceedings, cannot be maintained, where it appears that the termination of the prosecution was brought about by compromise or agreement of the parties." See also *Cockburn v. Kettle* (1913), 28 O.L.R. 407, 12 D.L.R. 512; *Regina v. Knight* (1864), 9 Cox C.C. 437; *Richard v. Goulet* (1914), 23 Can. Crim. Cas. 327. 19 D.L.R. 371.

Counsel before me could not agree upon the facts leading up to the stay of proceedings referred to. Counsel for the accused contended that the stay was directed for the reason that the Crown

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was apprehensive that in the disturbed state of public feeling a jury might not give that calm and unprejudiced consideration to the case that was so requisite. Counsel for the Crown rejoined that the counsel for the accused was much of the same opinion, and that in reality the stay was a matter of mutual desire and agreement. Counsel for the accused further argued that the extract from the letter of the Minister of Justice, hereinbefore set out, truly indicated the intention of the Department of Justice, which was, not to insist on further proceeding with the prosecution, and argued that, in these circumstances, it was not proper or competent for a second information to be laid or proceedings gone on with thereunder.

To this counsel for the Crown replied that what the Attorney-General had intended to do, and all that he intended to do, appeared as a matter of record, and that nothing beyond that was done or intended.

It is manifest that, in these circumstances, I can, and should, look alone to the record as I find it.

Counsel for the accused further contends that the effect of a stay such as here entered precludes further action on the same indictment, or the bringing of a new one, at all events unless the ground be in the latter that there was some technical defect in the first one. He says that in reality, there being no contention available that there was any technical defect in the first indictment, the accused is in the same position as if a jury had been called, the Crown had offered no evidence, the jury had been directed to and had brought in a verdict of "not guilty," and this had been endorsed by the presiding Judge upon the indictment. He further says that this is a case in which deliberate action was taken for public reasons to put an end altogether to the prosecution.

Upon the authorities cited, I am unable to see that the motion can prevail. While the stay entered precludes further action upon the original indictment—in fact, permanently stays such action—it does not preclude the laying of a further information, as has been done here. In what was done when the stay was authorised and made effective, the accused was not put in jeopardy. What the result would have been had a jury been called, the accused pleaded not guilty, the Crown offered no evidence, and a verdict of the jury of "not guilty" recorded, I am not called upon to say.

It is suggested by counsel for the accused that the Crown proposes to proceed with the trial before the magistrate and opposes any application on the part of the accused to have the issues submitted to a jury. It is also argued that under the order in council in question there is no right of choice or election given to the Crown in the matter. In my opinion, these are matters that I am not at liberty to consider or deal with on this motion.

Being of the opinion that the accused is not being put a second time in jeopardy, and that the stay directed is not a bar to a further information, I direct that the motion be dismissed. In the circumstances, there will be no order as to costs.

The defendant served notice of an appeal from the order of SUTHERLAND, J., and entered the appeal for hearing in the Appellate Division.

On behalf of the Police Magistrate, a motion was made to quash the appeal of the defendant.

March 20. The appeal and motion were heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ., and FERGUSON, J.A.

Bayly, K.C., for the Crown and the Police Magistrate, argued that there was no right to appeal to this Court, because the matter was a criminal one, and sec. 151 of the Judicature Act says that nothing in that Act shall affect the practice or procedure in criminal matters. The defendant, to sustain his right of appeal, must be able to point to some statute giving him that right: *Attorney-General v. Sillem* (1864), 10 H.L.C. 704. There was no power in this Court to hear the appeal: *Regina v. Eli* (1886), 13 A.R. 526; *Regina v. Cushing* (1899), 26 A.R. 248.

[MEREDITH, C.J.C.P., questioned whether prohibition was the defendant's proper remedy.]

Raney, K.C., for the defendant, said that the question of procedure had been raised in the Police Court, that is, the question whether prohibition was the proper remedy. He asked leave to put in authorities upon this point. He contended that this Court had jurisdiction to hear the appeal: *Liverpool Gas Co. v. Everton Overseers of the Poor* (1871), L.R. 6 C.P. 414. The Court had all

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the powers of the former Divisional Courts: Crankshaw's Criminal Code, 4th ed., p. 826; *Rex v. Meehan* (1902), 5 Can. Crim. Cas. 307; *Re Rex v. Hamlink* (1912), 26 O.L.R. 381, 5 D.L.R. 733; *Regina v. Holl* (1881), 7 Q.B.D. 575. Prohibition is a civil proceeding: Short & Mellor's Crown Office Practice, p. 512. So much for the preliminary objection. On the merits, the learned Judge below had cited in his reasons for judgment all the important cases. The purport of these cases was, that, if a defendant should seek to avail himself of technicalities, the Crown officer might stay prosecution and begin over again. The point was, could this be done in circumstances such as the present? Where there had been a stay granted on account of irregularity of proceedings, the Crown might start over again. But where, as here, the stay had been obtained for public reasons, no second prosecution should be allowed.

Bayly, K.C., contended that this was not a matter for prohibition. Secondly, he relied upon the reasons of Sutherland, J. And, thirdly, he said that this was a little different from a new indictment. It had been laid under an order in council, and under it the Crown had a right to proceed summarily or to take the case to a jury: *Rex v. West* (1915), 34 O.L.R. 368, 35 O.L.R. 95.

March 21. MEREDITH, C.J.C.P.:—The only question which could be raised properly upon the motion for prohibition was, whether the provincial police officer who was proceeding with the investigation of this criminal matter, had jurisdiction in the matter; and that was quite a proper matter for consideration in this provincial Court—the Supreme Court of Judicature for Ontario: if the officer were usurping a power which he had not, this Court should have prohibited him; and such a proceeding would not have been one affecting “the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters,” within the meaning of those words in sec. 91 (27) of the British North America Act, 1867, conferring exclusive legislative power in such matters upon the Parliament of Canada: it would not have been a step in a criminal proceeding in the matter of this criminal charge, but would be one quite without and only collateral to it. It is, therefore, in my opinion, quite competent for the appellant to prosecute this appeal from the order

in appeal dismissing the application for prohibition on the ground of want of jurisdiction.

But I think it equally plain that the question considered upon the application for prohibition, and discussed here again, was not one of jurisdiction, but was one for consideration in the criminal proceedings, and there only: and so the motion for prohibition was misconceived, and ought to have been dismissed for that reason.

The one ground upon which prohibition was and is sought was and is: that the applicant had before been prosecuted for the same offence, and that that prosecution ended finally in his favour—in short, that the present criminal proceedings must fail because the applicant was in effect acquitted in the earlier proceeding and should not be twice vexed.

But such a contention is in no sense an objection to the magistrate's jurisdiction: the subject-matter of the charge is one admittedly within it; and so the contention, instead of shewing want of jurisdiction, shews the contrary, shews the need of the criminal proceedings to determine, in fact and in law, whether the earlier prosecution is a bar to the later one.

And in that way the case is one within the criminal law, which affords ample opportunity to have this defence fully and fairly tried by the magistrate, and to have his rulings in it reviewed in the manner provided in the Criminal Code.

For these reasons and on that ground only, I am in favour of dismissing this appeal. There was, in my opinion, no jurisdiction in this Court, upon this application, to consider the question upon which the application was dismissed in the High Court Division. The case is, therefore, in my opinion, one in which no order as to costs should be made.

LATCHFORD, J.:—Assuming that it is open to the Court to entertain the application for prohibition in any case, I am of the opinion that effect must be given to the motion made by Mr. Bayly. The law is concisely stated by Boyd, C., in *Rex v. Phillips* (1906), 11 O.L.R. 478, 479:—

“Prohibition will not lie unless there is a lack of jurisdiction in the judicial officer or Court dealing with the proceedings.”

The lack of such jurisdiction is not suggested, and the appeal should, therefore, be dismissed. No costs of the appeal.

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MIDDLETON, J.:—Without considering any of the other questions discussed, and assuming that we have jurisdiction, I think it is clear that the motion made to my brother Sutherland was entirely misconceived and was rightly dismissed.

The jurisdiction of the Supreme Court over courts of inferior jurisdiction, by mandamus and prohibition, is for the purpose, on the one hand, of compelling the tribunal to exercise its true function, and, on the other hand, to prevent any court of limited jurisdiction from exercising or attempting to assert a jurisdiction which it does not possess.

The decision of all questions within the jurisdiction of such courts is for them alone, and this Court cannot, by exercise of its prerogative jurisdiction, control the decision of the lower court on a matter within its competence: *Rex v. Nicholson*, [1899] 2 Q.B. 455, 467; *Rex v. Registrar of Companies*, [1912] 3 K.B. 23, 34; *Ex p. Roe* (1914), 234 U.S. 70; *Ex p. Slater* (1918), 246 U.S. 128.

BRITTON, J., and FERGUSON, J.A., agreed in the result.

Appeal dismissed without costs.

After the decision of the Appellate Division, the defendant made another motion for prohibition.

April 14. The motion was heard by MASTEN, J., in Chambers. *R. McKay*, K.C., for the defendant.

Bayly, K.C., for the Crown and the Police Magistrate.

April 15. MASTEN, J.:—Motion on behalf of the defendant for an order prohibiting R. E. Kingsford, Police Magistrate for the City of Toronto, from trying this case by summary proceedings under Part XV. of the Criminal Code, and from making a conviction herein, and from imposing any penalty on the defendant, on the ground that there is no jurisdiction in the said Police Magistrate under the War Measures Act, or the orders in council respecting censorship, to try the defendant, or to convict him, or to impose any penalty upon him under the information herein, the defendant's contention being that he is entitled to a trial by jury.

In support of the motion are read the proceedings taken under the former information dated the 15th March, 1918, and the indict-

ment found by a grand jury of the county of York under the said proceedings instituted in March, 1918. In addition to the matters mentioned in the notice of motion, there are handed to me: a certified copy of the proceedings in the Police Court on the 10th January, 1919, and a certified copy of the proceedings in the Police Court on the 11th April, 1919; the original indictment in the case of *The King v. Spence*, dated the 6th May, 1918, with the endorsement thereon; a copy of the judgment of Mr. Justice Sutherland, delivered on the 1st March, 1919; a copy of the judgments delivered in the Second Divisional Court of the Appellate Division on the 21st March, 1919; and a copy of the judgment of R. E. Kingsford, Esquire, Police Magistrate, upon an application for the statement of a special case.

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This is a second motion for a prohibition in the same proceeding. A former application was refused by my brother Sutherland. It is argued that successive applications for an order of prohibition are allowable, and that this application is founded on a new ground not brought forward before my brother Sutherland.

As I understand the practice, successive applications are sometimes allowed, largely confined, however, to cases where the first application has failed because of lack of some formality in the proceedings.

After a careful perusal of all the material, I am unable to see that the situation has in any way altered since the application was launched before my brother Sutherland. Nothing appears to have occurred in the Police Court since that time, giving rise to a new state of facts. At the close of his judgment my brother Sutherland says:—

“It is suggested by counsel for the accused that the Crown proposes to proceed with the trial before the magistrate and opposes any application on the part of the accused to have the issues submitted to a jury. It is also argued that under the order in council in question there is no right of choice or election given to the Crown in the matter. In my opinion, these are matters that I am not at liberty to consider or deal with on this motion.”

The present application is based on two grounds: first, that under the provisions of the War Measures Act, and the orders in council respecting censorship, the magistrate has no jurisdiction to try the defendant; second, that the defendant is entitled to a trial by jury.

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Both of these grounds were open and available to the defendant at the time of the former motion, and it might suffice for the disposal of the present application to say that, in my opinion, I ought not to entertain this application where no new situation has arisen since the former application, and where one of the points was disposed of in the way indicated in the judgment of Mr. Justice Sutherland, and the other could have been brought before him, if so desired.

The order of Mr. Justice Sutherland was appealed to the Appellate Division, and the appeal was disallowed. No mention appears to have been made in that Court of either of the objections now put forward.

However, as the matter has been fully argued before me, it is perhaps desirable that I should not summarily dispose of the motion on the ground just mentioned, and I therefore proceed to consider the two objections which were argued before me, and which I have stated above.

With regard to the second objection, it appears to me to be fully covered by the judgment of Mr. Justice Middleton in the case of *Rex v. West*, 34 O.L.R. 368, affirmed in the Court of Appeal, 35 O.L.R. 95.

The order in council, order 3, sec. 3, sub-sec. 2, directs that the penalty may be recovered or enforced either by indictment or by summary proceedings, and conviction, under the provisions of Part XV. of the Criminal Code.

These proceedings are brought under Part XV. of the Criminal Code, and, as shewn by the case of *Rex v. West*, the choice of tribunal rests entirely with the prosecution.

The first objection is based upon the argument that, while admittedly sec. 6 of the War Measures Act, if standing alone, would have authorised the passing of the order in council under which this prosecution is taken, yet that it is modified and limited by the provisions of sec. 10; that sec. 10 gives authority to the Governor in Council to impose penalties and to prescribe whether such penalty is to be imposed upon summary conviction, or upon indictment; that only one method of prosecution can be prescribed by the order in council; that the power so given is in the alternative; and that the order in council exceeds and transcends the statute by providing that the prosecution may be had either upon summary conviction or on indictment.

On the hearing of the motion, the question was elaborately argued, and many authorities were cited. Without expressing any final conclusion regarding the matter, I am definitely of opinion that the lack of jurisdiction here said to exist does not appear with sufficient clearness to warrant the issue of an order of prohibition; and, therefore, in the exercise of my discretion under such circumstances, I would refuse the order.

It is to be understood that the grounds which I have last mentioned are additional to that first expressed, namely, that a second motion for prohibition does not lie under the circumstances here existing.

The motion will be refused, with costs.

The defendant appealed from the order of MASTEN, J.

April 28. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

McKay, K.C., for the defendant, said that he was seeking to have the magistrate prohibited from trying the case, on the ground of want of jurisdiction under the War Measures Act or the orders in council respecting censorship; not from making a preliminary investigation. He argued that the order in council relied on was illegal, because the War Measures Act did not give the Governor in Council power to make it. Section 10 of the Act restricts the powers conferred by sec. 6. Only one method of prosecution can be legally prescribed by order in council, either summary conviction or indictment: *Taylor v. Corporation of Oldham* (1876), 4 Ch. D. 395; *Channel Coaling Co. v. Ross*, [1907] 1 K.B. 145; *Bartlett v. Higgins*, [1901] 2 K.B. 230; *Wood v. Riley* (1867), L.R. 3 C.P. 26. Successive applications for an order for prohibition are allowable. Prohibition will lie before the end of a trial, that is, while the trial is proceeding: *Darby v. Cosens* (1787), 1 T.R. 552. On the question whether a point that might have been taken in a former proceeding, but was not, could be used in a subsequent proceeding, reference was made to *Farquharson v. Morgan*, [1894] 1 Q.B. 552; *In re Thompson v. Hay* (1893), 20 A.R. 379; *Re Mitchell v. Doyle* (1913), 4 O.W.N. 725, 23 O.W.R. 926. This was a penal statute, and should be construed strictly, as the liberty of the subject was involved.

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Bayly, K.C., for the Crown and the magistrate, on the question of the omission to raise the point of jurisdiction in the former application, referred to Holmsted's *Judicature Act*, 4th ed., p. 1284, and the cases there cited. The trial should be allowed to proceed. After the magistrate's decision, the defendant would have various remedies, for instance by way of appeal or stated case. There could be no doubt about the jurisdiction of the magistrate to try the case, and the Court should not interfere with him when in his discretion he determined to try it summarily rather than send it to a jury. The powers given in sec. 6 of the War Measures Act are very wide, and are not restricted by sec. 10, as contended by the appellant.

McKay, in reply, referred to *Rex v. West*, 35 O.L.R. 95.

April 29. The judgment of the Court was read by MEREDITH, C.J.C.P.:—If we have power, and, having power, ought to prohibit the Police Magistrate from trying this case summarily, if it be not lawful for him to do so, I should in such case be in favour of dismissing this appeal, upon the ground that it is lawful for him, and that he is in law bound, so to try it.

Under the order in council, upon which the prosecution is based, that is admittedly so; but it is said that the order in council, in this respect, is illegal, that no power to make it was conferred on the Governor in Council by the War Measures Act, 1914, upon which only it is sought to be supported.

The offence with which the defendant is charged is one based upon the order in council; and one which admittedly could be created under the powers conferred upon the Governor in council by sec. 6 of the Act, which section is in these words:—

"The Governor in Council shall have power to do and authorise such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

"(a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;

"(b) Arrest, detention, exclusion and deportation;

"(c) Control of the harbours, ports and territorial waters of Canada and the movements of vessels;

"(d) Transportation by land, air, or water and the control of the transport of persons and things;

"(e) Trading, exportation, importation, production and manufacture;

"(f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

"2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such Courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation."

But it is contended, for the defendant, that the provisions of sec. 10 of the Act restrict the powers conferred by sec. 6 to such an extent that the order in council, in so far as it provides for the manner of prosecution for offences created by it, is *ultra vires*.

Section 10 is in these words:—

"The Governor in Council may prescribe the penalties that may be imposed for violations of orders and regulations made under this Act, but no such penalty shall exceed a fine of five thousand dollars or imprisonment for any term not exceeding five years, or both fine and imprisonment, and may also prescribe whether such penalty be imposed upon summary conviction or upon indictment."

And the part of the order in council which is called in question is in these words (Consolidated Orders respecting Censorship, May 21, 1918, Canada Gazette, vol. 51, June 8, 1918, pp. 4296, 4297; republished in the Canada Gazette, November 16, 1918, vol. 52, p. 1683 *et seq.*, for the purpose of correcting the former publication as to the date, which should be May 22, 1918):—

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Order II. "2. (1) No person shall, unless with lawful excuse or authority, the proof of which shall lie on him, speak, utter, write, print, publish, post, deliver, receive or have in his possession or on premises in his occupation or under his control, any statement, opinion and report or any letter or other writing or any newspaper, tract, periodical, book, circular or other printed publication or any photograph, sketch, plan, model, record or other representation, containing or consisting of objectionable matter."

Order III. "1. (1) Any person contravening or failing to observe, abide by or perform any of the provisions of these orders . . . shall be guilty of an offence against these orders."

"3. (1) Any person guilty of an offence against these orders shall be liable to a penalty not exceeding five thousand dollars or imprisonment for any term not exceeding five years, or to both such fine and such imprisonment.

"(2) Such penalty may be recovered or enforced either by indictment or by summary proceedings and conviction under the provisions of Part XV. of the Criminal Code."

Three things are provided for in sec. 10: penalties may be prescribed for offences against orders and regulations made under the Act; they shall not exceed the limits named in the section; and it may be prescribed whether such penalties shall be imposed upon summary conviction or upon indictment.

It will be observed that the first and last of these three things are permissive, and the second imperative: and that which we are asked to do is really to rule that all three are imperative, if any penalties are imposed; that sec. 10 overrides sec. 6 in this respect.

But plainly the only restraint meant was as to the measure of the penalties: the other provisions of the section purport to confer power; and not, in any way, to curtail the power conferred by sec. 6.

Under sec. 6, admittedly, penalties could be prescribed, and the manner in which they might be imposed might be provided for: therefore, if it were meant to restrict such power, the third provision of sec. 10, like the second provision, should have been imperative.

I am quite unable to consider that enough is said in sec. 10 to take away really the whole effect of the wide and plain words: "and shall be enforced in such manner and by such Courts, officers

and authorities as the Governor in Council may prescribe," contained in sec. 6.

What the words in question mean, in my opinion, is: that the Governor in Council should have directly expressed power to provide that prosecutions should be only summary or only by indictment—in effect to take away, or make imperative, trial by jury; but should not be required to do so: that he might, instead of acting under sec. 10, by virtue of the powers conferred under sec. 6, make such other provision as might be deemed "necessary or advisable:" and, acting under that section, wisely left to the Crown the determination, upon the facts of each particular case, of the question whether the war-time interests of the country, under such stress as the recent great and long war, required that the prosecution should be a summary one or one by indictment; a thing by no means unknown to the criminal law before: see *Rex v. West*, 35 O.L.R. 95. To give effect to the defendant's contention would be to make the order in council nugatory as to all penalties, and make all that have been imposed illegal, because no lawful means of imposing them has been prescribed under sec. 10.

But whether we have power, or having power should exercise it, are questions which I, speaking only for myself, do not desire to be treated as if answered in the affirmative.

Legislation as to crimes and criminal procedure pertains exclusively to Parliament, which has provided a code dealing somewhat comprehensively with the subject: a code which gives the defendant ample means of redress in the Courts of this Province if any injustice be done to him. I am not fully convinced that prohibition lies in such a case as this. It is plainly very different from a case in which there is no jurisdiction. There is admittedly and obviously jurisdiction in the magistrate over the case: the only question is as to the proper method of dealing with it, whether summarily by him, or whether he should send it on for trial on indictment. He considered that it could be tried summarily against the will of the defendant, and he is trying it accordingly. If he be wrong, ample provision is made in the Code for relief in several ways. The only difficulty arises from the desire of the defendant to have the question which he raises determined before trial; but Parliament has made no provision for that: see *Broad v. Perkins* (1881), 21 Q.B.D. 533; *Mackonochie v. Lord Penzance* (1881), 6 App. Cas.

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424, 440; *Mayor etc. of London v. Cox* (1867), L.R. 2 H.L. 239, 283; and *Rex v. General Commissioners of Taxes for Clerkenwell*, [1901] 2 K.B. 879.

If we have no power, that ends the matter; if we have power, and a discretion, no sufficient reason, in my opinion, has been shewn why the case should not be left to take the ordinary course of a criminal case under the Criminal Code.

I am in favour of dismissing the appeal.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

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RE MONARCH BANK OF CANADA.

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April 30

MURPHY'S CASE.

Company—Winding-up of Banking Company—Contributory—Subscriber for Shares—Allotment—Informal Notice in Writing—Sufficiency—Necessity for Allotment—Nature of Transaction—Agreement to Give and Take Shares—Promissory Note Given for Price—Condition upon which Agreement Made—Condition Subsequent.

M., being solicited by an agent of the bank to take stock, by a writing over his signature, and declared to be over his seal also, subscribed for and agreed with the bank to accept 30 shares and to pay therefor \$125 per share. Part of the price was to be paid upon allotment and the balance by instalments; but M. reserved the right to pay for the shares in full upon the allotment on the terms of the prospectus. He made a promissory note for \$3,750, payable on demand, to the order of the agent, and took from the agent a receipt for the demand note "in payment of 30 shares . . . M. to be a provincial director. . . ." The note was endorsed by the agent to the bank, and sent to the provisional directors, who (as was admitted) duly allotted 30 shares to M. No formal or direct notice of allotment was given to M., but he was notified by the bank in writing that his note was due and asked to give it his "prompt attention." Nothing was paid upon the note; an order was made for the winding-up of the bank; and in the proceedings thereunder the liquidator sought to make M. liable as a contributory:—

Held, assuming that allotment and notice of allotment were necessary to bind the bargain, that allotment was duly made, and the written demand made upon M. for payment of the note was sufficient notice; he had knowledge of the allotment, and that was all that was necessary.

Held, also, that the document signed by M. was not a mere application for shares, which required an answer, but was an agreement to give and take the shares in question, and was so understood and acted upon by every one concerned in it.

It was said that the agreement was made upon the condition that M. should be appointed to some local office in management of the bank and that his account should be taken over by the bank:—

Held, assuming the condition to have been proved and the undertaking to have been that of the agent, that the condition was a condition subsequent, and so no defence to a claim for payment for the shares.

Held, therefore, that M. was properly made a contributory.

AN appeal by Edward Joseph Murphy from the order or direction of J. A. McAndrew, K.C., an Official Referee, in the course of a reference for the winding-up of the bank, that the name of the appellant should be placed on the list of contributories.

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June 20, 1918. The appeal was heard by FERGUSON, J.A., in the Weekly Court, Toronto.

W. J. McWhinney, K.C., for the appellant.

J. H. Spence, for the liquidator of the company, respondent.

June 24. FERGUSON, J.A.:—The appellant signed an application for shares, agreeing to pay therefor in instalments, in the manner and at the times set out in the written application. At the same time he and the agent of the bank who solicited his application entered into an oral agreement whereby the appellant gave the agent Barry a demand note for the total amount of his subscription, and Barry agreed to have the note accepted by the bank as payment for the shares, and to have the appellant appointed a director of the bank, and that the bank would take over his trading account and furnish him and his firm with large credits. The bank did not sue upon the note but upon the original subscription. In the books of the bank the shares were allotted on the terms of the original subscription. It is not asserted that the appellant was sent or received any notice of such allotment. It is, however, urged that, because he was notified by letter that his note was overdue, he had constructive notice of allotment under his signed application.

I cannot agree with this argument. It might be inferred from that letter that the bank had agreed to accept the subscription on the terms of the appellant's oral offer made to Barry, but the liquidator does not contend that this was done, and the books of the bank do not shew it to have been considered.

I am of the opinion that the liquidator has failed to shew an acceptance by the bank of the written subscription, by proving both allotment and notice of allotment pursuant to that subscription, and for that reason has failed to make out his claim, and that the appeal should be allowed with costs.

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CASE.

The liquidator appealed from the order of FERGUSON, J.A.

April 30, 1919. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

W. K. Fraser, for the appellant, argued that there had been allotment and notice of allotment; that the letter notifying Murphy that his note was overdue was constructive notice of allotment. Murphy knew that his subscription had been accepted, and so no notice of allotment was necessary: *Re Publishers' Syndicate, Hart's Case* (1902), 1 O.W.R. 508; *Nelson Coke and Gas Co. v. Pellatt* (1902), 4 O.L.R. 481. If there was any condition attaching to the acceptance of the stock, this condition was never communicated to the bank, and so the application was unconditional: *In re Universal Banking Co., Harrison's Case* (1868), L.R. 3 Ch. 633, at p. 638. If there was a condition, Murphy waived it by taking no steps to get his note back: *Barrett v. Bank of Vancouver* (1917), 36 D.L.R. 158; *Morrisburgh and Ottawa Electric R.W. Co. v. O'Connor* (1915), 34 O.L.R. 161, 23 D.L.R. 748.

W. J. McWhinney, K.C., for Murphy, the respondent, contended that there had been no notice of allotment. Murphy never knew that the stock had been allotted to him: *British and American Telegraph Co. Limited v. Colson* (1871), L.R. 6 Ex. 108. Murphy's acceptance of the stock was only conditional, and the condition had not been fulfilled by the bank: *Arnot's Case* (1887), 36 Ch.D. 702. The knowledge of the agent about the creditor was the bank's knowledge: *Bawden v. London Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534; *Bank of Australasia v. Palmer*, [1897] A.C. 540; *Pellatt's Case* (1867), L.R. 2 Ch. 527, at p. 533; *Webb v. Shropshire Railways Co.*, [1893] 3 Ch. 307; *Spargo's Case* (1873), L.R. 8 Ch. 407; *Northern Crown Bank v. International Electric Co.* (1910), 22 O.L.R. 339.

April 30. MEREDITH, C.J.C.P.—The bank, following an ordinary method in like cases, sought purchasers, of its stock, through persons empowered by it to solicit purchasers; and one of such persons, having solicited the respondent, made the contract in question in this matter, for the bank, with him. In that transaction, the respondent, over his own signature, and asserting

in the writing that it was over his own seal also, agreed with the bank to take the shares in question, and made, by way of his promissory note, payment for the shares in accordance with the agreement; and the agreement and note were then sent to the bank by the person who made the sale: the stock was allotted at once; and subsequently payment of the note was demanded, in writing, by the bank from the respondent.

Under these circumstances, the Referee put the respondent's name upon the list of contributories, in respect of these shares, in the winding-up of the bank under the Winding-up Act; but, upon the respondent's appeal to a single Judge, the name of the respondent was removed from the list, on the ground that notice of allotment of the shares had never been given to him.

It is said that in England agreements to take shares in a company about to be or being formed, are usually made by way of an application for shares, an allotment of the shares, and notice of such allotment; but I am not sure that that method can be said to be the common one in this Province; if it could be, it would be needful to add that there are many exceptions.

Assuming, however, that allotment and notice were needed to bind the bargain, allotment was admittedly duly made, and there was, as I cannot but find, notice. The notice required can be only such as is needed to bring, or as brings, knowledge of the fact to the applicant: that is its purpose—the only reason for requiring it; and notice of that character was given to the respondent in the written demand which was made upon him in respect of the payment of his note; that is made very plain by him in his testimony in this matter; it is there admitted, more than once; that he knew that he had the stock; and he made no such pretence as is here made for him, that he was a mere unanswered applicant for it, without knowledge of its allotment.

The facts do not support the ruling appealed against: the ruling therefore falls.

But, in my opinion, upon another ground this appeal should be allowed.

Whether the method before mentioned be or be not the one usually followed in this Province, it was not followed in this instance. The substance of the transaction was an agreement to give and to take the shares in question; and it was so understood

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and acted upon by every one concerned in it. Acceptance of the price, or part of the price, should, alone, bind the seller. Mere applications for shares are not made by deed, or that which is intended for a deed, nor are first payments of the purchase-price so made. Applications may be so made and deposits may be made without bank or company being bound; but there should be something making that evident in a case of deed and payment. All that was done on each side shews that this transaction was not one of that character, nor at all thought to be by any one concerned in the making of it.

On this ground I am in favour of restoring the respondent's name to the list, if his third ground, yet to be dealt with, fails.

The third ground, upon which it is sought to support the ruling appealed against, is: that the agreement to take the shares was made upon the condition that the respondent should be appointed to some local office in management of the bank and that his account should be taken over by the bank: but, assuming such a condition to have been proved, and assuming that the undertaking, if any, was not, as in *Simon's Case**—as the writing taken by Simon proved it to be—that of the bank, but was that of the person who solicited and made, for the bank, the agreement, the condition was plainly, indeed necessarily, a condition subsequent, and so no defence to a claim for payment for the shares; and, if made the subject of a claim for damages, might fail because the failure of the respondent to make payment for his shares in part prevented a fulfilment of any such conditions. Purchasers did not pay for their shares, and the bank went to the wall.

The appellant might have been proceeded against on his note instead of upon the consideration for it, but in that case his position should have been worse rather than better. It is a creditor's right to proceed either way, or both.

We all agree that the appeal should be allowed and that the respondent's name should be restored to the list.

RIDDELL, J.:—This is an appeal from the order of Mr. Justice Ferguson of the 24th June, 1918, whereby the report of Mr. McAndrew, Official Referee, was reversed, by which report the

**Re Monarch Bank of Canada, Simon's Case* (1918-19), 14 O.W.N. 295, 16 O.W.N. 171.

Official Referee, on the 20th February, 1917, found the respondent, Murphy, liable in a winding-up proceeding for the sum of \$3,750 and interest.

The facts of the case are not very complicated; those material are as follows:—

The Monarch Bank of Canada was incorporated by the Dominion Act (1905) 4 & 5 Edw. VII. ch. 125, assented to on the 20th July, 1905. After a number of meetings of what are called the "incorporators" of the bank, the directors mentioned in the charter had meetings from time to time.

Apparently one J. F. Barry was appointed agent for the purpose of soliciting subscriptions, although there is nothing in the minutes of the provisional directors indicating his employment. However that may be, Barry, affecting to act as agent for the bank, called upon the respondent, Edward Joseph Murphy, a wholesale dry-goods merchant in Halifax, and solicited a subscription for stock. The respondent informs us that Barry's proposition was that if he, the respondent, would qualify as a director in Halifax, the bank would take over his account and give him an advance of \$50,000 at a rate of interest one half per cent. lower than he was already getting at the Bank of Montreal, and that the Monarch Bank would give him other accommodation. Whether that was before or after his subscription for stock does not appear, but at all events he says that he did sign the subscription for stock, which was to be paid for by a demand note.

He signed a subscription for stock, of which the important parts are as follows:—

"I, the undersigned, hereby subscribe for 30 (thirty) shares of the capital stock of the Monarch Bank of Canada, at the price of \$125 per share, and do covenant and agree to and with the incorporators of the said bank, with the bank itself, and with every other subscriber of the said bank, by virtue of this my subscription, to accept the shares now applied for, or any lesser number that may be allotted to me, and to pay for the same as follows: \$10 on account of \$25 premium on each share hereby subscribed for, upon the signing hereof, and to pay \$5 on account of \$25 premium on each share of stock upon allotment, and to pay a further \$30 on account of each share of stock upon allotment, and to pay seven

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equal monthly payments of \$10 each on stock per share on the first day of each and every month of the seven months immediately succeeding the date of such allotment, and to pay the balance of \$10 premium on each share on the first day of the month next succeeding the date of the last monthly payment hereinbefore mentioned, and the above payments of \$10 and \$5 each on premium and the further payments mentioned to be made on stock shall be made to the Toronto General Trusts Corporation until the sum of \$250,000 of capital stock is paid-up, together with the premium thereon, and the payments so made to the said trusts corporation shall be at the disposal of the provisional directors of the said bank, or the majority of them, and after the said sum of \$250,000 of capital stock is paid-up the balance of payments on stock and premium shall be payable to the Monarch Bank of Canada.

"I reserve for myself the right to pay these shares in full upon the allotment on the terms of the prospectus.

"The shares of stock so subscribed for shall not be assignable or transferable unless and until the same are paid up in full.

"The Toronto General Trusts Corporation shall place all such payments made to them to the credit and at the disposal of the provisional directors or the majority of them named by Act of incorporation of the said bank."

He gave his demand note, dated the 6th August, 1906, for \$3,750, to the order of J. F. Barry, agent, with interest at $5\frac{1}{2}$ per cent. per annum, and took from Barry a receipt in the following language:—

"Halifax, N.S.

"Aug. 6, 1906.

"Received from E. J. Murphy, Esq., his demand note dated Aug. 6, 1906, for \$3,750 (thirty-seven hundred & fifty dollars) in payment of 30 (thirty) shares of Monarch Bank stock, Mr. Murphy to be a provincial director at Halifax, N.S.

"J. S. BARRY, agent,

"Monarch Bank of Canada."

The note was endorsed to the order of the Monarch Bank of Canada, without recourse, by Barry, and sent in by him, apparently on the 6th August, to the provisional directors; and on the 22nd August, at a meeting, 30 shares of the capital stock were allotted to Edward J. Murphy, the respondent herein.

The bank found difficulty in getting a sufficient amount of capital subscribed, and on the 18th September, 1906, Mr. Ostrom, the provisional managing director, wrote:—

“We are advised by Mr. Barry to inform you as nearly as possible just when our bank will be open for business, and I think to save you any unnecessary trouble it will be well to give it the time-limit. I am afraid we will hardly be able to open for another three months, as the directors desire to sell and distribute a large amount of stock so that we may start with a reserve, and I think you will agree with me, as a business man, that it will be better to delay a little longer and not be handicapped when we do open.

“Trusting this will meet with your approval and thanking you in advance for your influence with prospective subscribers of the bank and hoping to make your acquaintance when I visit Halifax, I am,” etc.

On the hearing, the respondent seems to have forgotten about that letter, as he says he did not hear from the bank after his subscription until the winding-up order was made.

On the 12th November, the managing director again wrote to the respondent as follows:—

“We beg to notify you that your note for \$3,750 fell due to-day. We regret that you have not been notified of this before, but the Toronto General Trusts Corporation, in whose care your note is assured, said at the time we deposited it with them that they would notify at least one week before the note fell due. I was not aware until to-day that this had not been done. You understand when we depended on them we did not want to trouble you with two notifications.

“Trusting this will receive your prompt attention, and I am pleased to tell you that the bank is progressing. We are strongly advised to have one million subscribed before opening our doors for business, but this will be a matter for the directors to decide at a later date.”

Whereupon Murphy answered on the 15th November:—

“I am in receipt of your favour of the 12th inst. and am very much surprised at its contents. The note signed by me was a demand note, and I cannot understand how it has become due on the 12th inst.

“The arrangement made with Mr. Barry was that this note was to be held by you and the interest paid out of the remuneration

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due me as local director. I have never received any stock certificate, and if this stock stands in my name it can be realised on to retire this note. In which case, all arrangements with Mr. Barry will be off, viz., that we transfer our account to your bank according to agreement made with him.

"Mr. Barry is out of town at present, but is expected back in a few days, when I will go into the matter with him.

"I have no intention of retiring this note at present, and if it has to be paid it will be done by realising on the stock."

And the managing director replied, on the 21st November:—

"We have your favour of the 15th, and note what you say. We have sent Mr. Barry a copy of the same letter at Ottawa, and no doubt he will take it up with you."

An order was made for the winding-up of the bank, and, as has been said, the respondent has been held liable by the Referee, but relieved by my brother Ferguson.

The sole ground upon which my learned brother proceeds is that Murphy received no notice of the acceptance of his subscription.

The statement of law of Lord Cairns in *Pellatt's Case*, L.R. 2 Ch. 527, has always been accepted (p. 535): "I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract."

As it seems to me, however, the present case does not fall within *Pellatt's Case*, and that for two reasons:—

In the first place, the subscriber reserves for himself the right to pay for these shares in full upon the allotment, on the terms of the prospectus. He swears that he gave this note in payment for 30 shares of the bank's stock, and the receipt which he took from Barry shews that this is in a sense correct, that he was paying for his 30 shares in full. Accordingly, as I think, there was an obligation on the part of the bank to let him have these shares, which he had paid for in a sense, that is, for which he had given his note.

But, assuming that in this case there was a necessity for a response by the company, it is well decided that that response need not be formal. As was said by Sir John Rolt, L.J., in *Gunn's Case* (1867), L.R. 3 Ch. 40, at p. 45, it is sufficient if there is

"in writing, or verbally, or by conduct, something to shew the applicant that there was a response by the company to his offer." It seems to me to be abundantly clear that Murphy knew by the conduct of the bank that the bank had accepted his offer. In his evidence he says that he knew there was stock issued to him (see p. 5, at the beginning). That being so, there was something to inform him that there had been a response by the company to his offer.

It seems to me, too, that the letter of the 12th November, 1906, is a sufficient notification to him, especially when taken in connection with the letter of the 15th November, 1906, in which he suggests that his note which had been given for the stock should be paid by realising on the stock. There is nothing like repudiation on his part.

I think he had sufficient notice, if notice were necessary, and I do not further consider the question as to whether notice was necessary.

It is perfectly plain, in my view, that the so-called conditions upon which the respondent subscribed for the stock, were not conditions precedent, but conditions subsequent, and that these cannot be set up, not having been taken advantage of to rescind or withdraw the subscription for stock before the winding-up, even if they might or could have been available then.

An argument which was apparently raised before the Referee was not addressed to us, namely, that in any case this note given by the respondent was in full payment for the stock, and therefore could not be considered as unpaid, and the stock must be taken to be fully paid-up stock. The argument is that the only thing the bank had was the promissory note.

It is true the respondent does say that the note was given in full payment of the stock, but the whole transaction shews that it was not intended that all the bank should have would be a promissory note, and that they must rely upon that note.

The respondent says in his evidence that he was giving a note which was to be held by the bank and the interest paid half, yearly; that the note was not to be paid except the interest on it (except at his convenience); that the note was to be carried along just as long as he wanted it. The whole nature of the transaction as well as his evidence, shews that he knew he was undertaking a

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liability, and that the note was not intended to destroy this liability. It is, of course, trite law that a note given for a liability does not extinguish the liability unless it is expressly so agreed, or the nature of the transaction shews that it must have been so agreed—the note simply suspends the remedy. This matter not having been argued before us, I do not further pursue it.

I am of opinion that the judgment of my brother Ferguson should be reversed, and that of the Official Referee reinstated, with costs throughout.

BRITTON, LATCHFORD, and MIDDLETON, JJ., agreed that the appeal should be allowed.

Appeal allowed.

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[CLUTE, J.]

May 1.

SHEEHAN v. MERCANTILE TRUST CO. OF CANADA LIMITED.

Contract—Services Rendered to Master—Promise to Remunerate at Death of Master—Promise of Marriage—Breach—Compensation—Instrument in Writing Signed by Master Sued upon as Promissory Note—Certificate of Promise to Pay—Bills of Exchange Act, sec. 176—Evidence of Promise—Statute of Frauds—Uncertainty as to Time of Fulfilment—Will—Action against Executors—Corroboration—Evidence Act, sec. 12—Recovery upon Contract or upon Quantum Meruit.

The plaintiff, before the year 1901, was engaged by B., a money-lender, as bookkeeper, at a salary of \$10 a week. She remained in his employment down to the time of his death in November, 1915. His wife died in September, 1910. For many years, and until his death, the plaintiff was B.'s bookkeeper and secretary, made his collections, and managed nearly the whole of his business; and, besides, attended his wife as nurse during a long period, and afterwards was housekeeper and nurse to B. until two years before his death. During his wife's lifetime, B. promised to marry the plaintiff upon his wife's death and to make provision for her in his will if she would nurse his wife until her death, which the plaintiff did. He did not marry the plaintiff after his wife's death, though he renewed his promise to marry her, but he did, in June, 1910, make a will in which he gave the plaintiff the income of \$10,000, referring to her as his "bookkeeper and faithful nurse." This bequest B., early in 1913, purported to cancel. In March, 1913, after B. had refused to marry the plaintiff and was contemplating marriage with another person, he promised to give the plaintiff \$10,000 in lieu of the provision made for her in the will, and he then signed a document worded thus: "This is to certify that I have this day given to" the plaintiff "a promise of \$10,000 . . . at my death." He was then 80 years of age. In July, 1913, he signed another document as follows: "To whom it may concern. You will please pay to the bearer any money due to her as such collection is authorised by me." He made a new will in June, 1915, in which he gave the plaintiff \$3 a week. This will was cancelled in August, 1915, and a new will made, in which no bequest was made to the plaintiff. The last will signed by B. was dated the 15th

September, 1915—two months before his death. In it he gave to the plaintiff, "who was for many years my private secretary and bookkeeper for her long and faithful service in my behalf the sum of \$10,000 . . . the same to be accepted by her in full satisfaction of any claims that she may have against my estate." This was signed by B., but was not properly attested; and the will of August, 1915, was admitted to probate. The plaintiff sued the executors upon the promise made in 1913, alleging it to be a promissory note for \$10,000:—

Held, that the document was not a promissory note: Bills of Exchange Act, sec. 176.

Dasylova v. Dufour (1866), 16 L.C.R. 294, referred to.

The document, however, was evidence of a promise by B. to pay the plaintiff \$10,000 at his death, not only as compensation for her services, which had not, upon the evidence, been adequately remunerated, but also as compensation for the breach of his promise to marry her, that is, the promise made after his wife's death.

The agreement was not within sec. 4 of the Statute of Frauds: agreements consisting of mutual promises to marry do not require written evidence under the statute; and the contract was not to be regarded as one not to be performed within a year: where there is no mention of time, and the time is uncertain, the agreement is not within the statute.

Hanau v. Ehrlich, [1912] A.C. 39, followed.

There was ample corroboration to satisfy sec. 12 of the Evidence Act, R.S.O. 1914, ch. 76.

The plaintiff was entitled to recover either upon B.'s contract to pay her \$10,000 or upon a *quantum meruit*—in the circumstances of the case, \$10,000 should be fixed as a reasonable allowance.

ACTION by Lottie Maida Sheehan against the executors of Edman Brown, deceased, to recover \$10,000 upon an instrument called by the plaintiff a promissory note, signed by the testator, and said to have been dated on or about the 13th March, 1913. The instrument, when produced at the trial, appeared to have been mutilated—the date was not upon it, though the signature was.

April 3 and 4. The action was tried by CLUTE, J., without a jury, at Hamilton.

*W. M. McClemon*t, for the plaintiff.

A. J. Russell Snow, K.C., for the defendants.

May 1. CLUTE, J.:—The plaintiff is an unmarried woman, residing in the city of Hamilton, and brings the action to recover \$10,000 upon a promissory note said to be dated on or about the 13th March, 1913, made by the testator Edman Brown.

Edman Brown was a money-lender, residing in the city of Hamilton, and was, at the time the alleged note was made, about 80 years old. The plaintiff had been engaged by him prior to 1901 as bookkeeper, in the first instance at a salary of \$10 per week. She remained in his employ down to the time of his death

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on the 17th November, 1915. The testator's wife died about the 9th September, 1910. The duties and employment of the plaintiff increased so that for many years she was his bookkeeper and secretary, looked after his collections, and managed nearly the whole of his business; attended on his wife as nurse during a long period of time, and afterwards was housekeeper to the testator, and nursed him during his illness.

The testator was a man of considerable means, and lent his money principally upon chattel mortgages, mostly payable monthly. The testator's wife, prior to her death, broke her hip and was an invalid by reason of this injury for 5 years; the plaintiff nursed her during all that period, frequently carrying her up and down stairs. During his wife's lifetime, the plaintiff alleges, the testator promised to marry her on his wife's death and to make provision for her in his will if she would nurse the wife until her death, which I find she did. After the wife's death he did not fulfill his promise to marry her, but he had, prior to his wife's death, made his will, dated the 2nd June, 1910 (exhibit No. 3), in which is the following bequest:—

"I also will and bequeath to Lottie Maida Sheehan, my bookkeeper and faithful nurse in my sickness, monthly the income of \$10,000 the said income to start one month after my death and my wife's death."

This bequest purports to be cancelled in the following words:—

"I cancel all Miss Sheehan's moneys left her by my will as unworthy of same—Edman Brown." And the bequest is also crossed out in ink. The cancellation is not dated, but the evidence indicates that it was made early in the year 1913.

At this time, while the plaintiff continued in charge of Edman Brown's business, he had taken in another housekeeper, a Mrs. Sinclair, and on the 27th February, 1913, he purported to make a codicil to the said will in the following words:—

"As a codicil to the above will if Mrs. Sinclair's piano and other goods are in my possession at my death the said goods shall be given back to Mrs. Sinclair free of interest or principal."

This codicil does not purport to be witnessed and in the margin is written: "This clause is cancelled—this April 8, 1913. Edman Brown." There is no dispute as to the genuineness of this signature.

The plaintiff says that the testator told her he was engaged to marry Mrs. Sinclair, but that she could remain on as bookkeeper and secretary, doing his work as she had been doing it. She replied that if he married Mrs. Sinclair that would cancel the will already made in her (the plaintiff's) favour, and thereupon he promised to give her \$10,000 in lieu of the provision already made for her, for her services, and made the note sued upon. This occurred on or about the 13th March, 1913. The note is mutilated—what remains of it is as follows:—

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“Hamilton.

“This is to certify that I have this day given to Miss Maida Sheehan a promise of \$10,000; Miss Sheehan to have P t at my death. Edman Brown.”

I accept the above as a true statement of what took place. The signature to the document is not disputed, but the date and amount are not admitted.

There is a further document put in by the plaintiff to support the note; it is in the words following:—

“1913.

“Hamilton.

“July 27.

“To whom it may concern. You will please pay to the bearer any money due to her as such collection is authorised by me.

“Yours respectfully,

“Edman Brown.”

The testator made a new will on the 15th June, 1915 (by mistake endorsed “1815”), in which he makes the following bequest:—

“Allow Lottie Maida Sheehan \$3.00 per week to be paid weekly none of these bequests to be paid within three years after my death except Lottie Maida Sheehan her share to start in two months after my death; I leave myself power to add to or deduct from any bequest aforesaid named.”

Across the signature is written the following: “This will cancelled by order of Edman Brown and new will dated August 5, 1915, executed by him in place.”

On the 5th August, 1915, the testator executed a will, of which probate has been granted, appointing the defendants as executors, in which he made no bequest to the plaintiff, but made

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a bequest of the interest on \$10,000 to Helen Henas for her natural life; she was his last housekeeper, who had only been with him a few weeks.

Later, a further will was signed by the defendant dated the 15th September, 1915, in which appear the following words:—

“I give devise and bequeath to Lottie Maida Sheehan (plaintiff) who was for many years my private secretary and bookkeeper for her long and faithful service in my behalf the sum of \$10,000 to be paid to her by my said executors and executrix within three months after my death; the same to be accepted by her in full satisfaction of any claims that she may have against my estate.”

This will was signed by Edman Brown and witnessed by the plaintiff's mother, Annie Sheehan, and George Hunter. There is no dispute as to the genuineness of the signature of Brown, but the witnesses did not sign in the presence of each other, and the late Chancellor, in a previous case, declared that the will of the 5th August was entitled to probate, and not this will.

There was evidence given pro and con as to the physical and mental condition of the testator when the will of the 15th September, 1915, was signed. This is immaterial, of course, as to the validity of the will, but may have a bearing as to the testator's alleged intentions towards the plaintiff.

Dr. Gellne, who attended the testator in the last 4 or 5 years of his life, says:—

“I found Miss Sheehan there nurse on all occasions: she was his secretary and had a lot of clerical work; he was open about his affairs; he said at one time he intended to marry her; at another time he said he would not marry her. There was a change after Mrs. Sinclair came; she was housekeeper; he said several times he intended to leave the plaintiff \$10,000 in the will or interest on \$10,000; his statements to me were all subsequent to 1913; it was about a year before the Sinclair woman came into the house he said he was going to marry the plaintiff; I had no conversation with him about Miss Sheehan before 1913. He said: ‘Maida says she has a note of mine for \$10,000 but I don't think she has;’ this was at the time the plaintiff and Mrs. Sinclair had a severe quarrel; he was rather favouring the Sinclair woman. He was about as clear as he had ever been within the last 12 or 15 years before his death. I would scarcely think he would be able to

make a will on the afternoon before his death. Six months before he died he was riding around the block on a bicycle; his mental condition during the last six months of his life was perfect-giddy-peculiar. If he died on Friday, he was clear and had mental capacity to sign the will on Tuesday."

The September will was signed in the presence of Mrs. Sheehan on Tuesday, and he died on the Friday or Saturday following; the witness Hunter did not sign the will until later in the week.

Dr. Hendricks attended him for eye-trouble in February, March, and April of 1912: he says "the plaintiff seemed to be everything; she nursed him; he said she was his bookkeeper; he told me, at his death she was to receive \$10,000; he said she had more right to it than anybody else."

Mrs. Florence Fuller's evidence is to the same effect. He asked her what she thought of his second wife, and said: "I am leaving her \$10,000 at my death providing I do not marry her." This witness further says: "Mrs. Garbutt (his adopted daughter) and I were talking about it, and he jumped up and said he would leave it to her regardless of what any one said." She fixed the date of the note as the 13th March, 1913; she says she found the note in the earlier part of 1918. She remembers the time distinctly. It was signed on a bright afternoon, when she and Edman Brown had been walking up and down his back-yard for about an hour; they then went to the front verandah and sat down on a settee, and Brown, after taking a piece of paper from his pocket, went into the house and got a pen and ink, sat down again, and wrote out the note, which he handed to the plaintiff with the injunction to take good care of it. The plaintiff says she put the note in her blouse and then on the top of the desk for a few days, then in the desk for fear that some one would see it; she left it in the bottom drawer of her toilet-table. For a time she carried it in her satchel with a piece of red paper from which it was discoloured. She lost it in the street.

I believe the document called "the note" was handed to her by Brown as a further assurance for the promise that he made to give her \$10,000 payable at his death. Reading the document as it stands, it was not, I think, intended to be a promissory note: it is rather an assurance that he had given her a promise of \$10,000: "Miss Sheehan to have payment at my death"—it fixed the amount and the time of payment.

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A promissory note is defined (sec. 176) in the Bills of Exchange Act as "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer." The form of the note in the present case is: "This is to certify that I have this day given to Miss Maida Sheehan a promise of \$10,000; Miss Sheehan to have payment at my death." This seems to me rather a certificate that he had on that day promised her \$10,000 than a document itself creating that promise. He says, "I have this day given," etc. It is ambiguous and can be read in two ways. It was held by Taschereau, J., in *Dasylya v. Dufour* (1866), 16 L.C.R. 294, "that a writing merely certifying that a person is indebted unto another in a certain sum of money, is not negotiable as a promissory note."

The wording of the document is such that there might well exist an independent promise or document for the payment of this amount, and which conceivably the signer, Edman Brown, might be liable for; and, having regard to the circumstances of this case, I do not think I am justified in holding that the document sued upon is a promissory note. It is sought to strengthen it by the instrument purporting to be dated the 27th July (exhibit 2). This document was undoubtedly written by the testator Edman Brown. It bears upon its face a notice: "To whom it may concern. You will please pay to the bearer any money due to her as such collection is authorised by me." I do not think that this was given with the view that it authorised the executors to pay the amount of the note; it lends no weight in support of that contention. The plaintiff cannot, in my opinion, recover upon the document sued upon as a promissory note. It is, however, evidence of a promise to pay her \$10,000—at his death. She thought it a note. He did not. This clearly appears in the evidence.

Is the plaintiff then entitled to recover for breach of contract to pay \$10,000 given in lieu of payment for services rendered, and or breach of promise of marriage made after his wife's death? All the facts are fully before the Court, and amendment of pleadings made to meet the facts.

There is no doubt, from the documentary and other evidence, that the testator promised to pay the plaintiff for her services at

least as long ago as prior to the will of 1910, and repeatedly afterwards. The testator willed and bequeathed "to Lottie Maida Sheehan, my bookkeeper and faithful nurse in my sickness, monthly the income of \$10,000; said income to start one month after my death and my wife's death." This stood in her favour until cancelled—the exact date of the cancellation is not given. The purported cancellation was not witnessed. This will was superseded by the new will of the 15th June, 1915, in which, notwithstanding the change of mind apparent in the testator, provision is made for the plaintiff of \$3 per week, to be paid weekly, commencing two months after the testator's death.

I entertain no doubt that the testator, both before and after his wife's death had promised to marry the plaintiff, and that she was ready and willing to marry him, and that he finally broke off the engagement and refused to marry her; and I find such to be the fact. I further find that he promised to remunerate her for her valuable services rendered to him as bookkeeper, secretary and general assistant in his business, and as nurse for his wife and for himself; and I find that no adequate compensation has been made to her for these services; and, after he refused to marry her, he fixed the amount and promised to pay her at his death \$10,000—in lieu of his promise to marry her made after his wife's death—which she agreed to accept. No doubt, she is not entitled to recover for breach of the promise to marry her made prior to his wife's death: *Wilson v. Carnley*, [1908] 1 K.B. 729 (C.A.); *Spiers v. Hunt*, *ib.* 720; but this taint does not attach to the promise made after his wife's death. He was a "free talker," and repeatedly stated both his intention to marry her and also to make provision for her for her services. As early as 1910 the provision in the will shews his intention in this regard, and he continued such promises down to shortly before his death, and the document called the note confirms the promise and fixes the amount and time of payment. There is no doubt that his intentions were modified, owing probably to jealousy; but, up to shortly before his death, it was still his intention to make provision for her, though the amount was considerably reduced.

The defendants plead that the plaintiff gave receipts to the testator in full of all claims and demands, and, to support this contention, two receipts are filed, one a cheque, dated the 3rd April, 1912, for \$16, payable to the order of the plaintiff, and

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apparently in her handwriting. At the bottom are written the words "In full of account." The second receipt is a cheque, dated the 19th July, 1912, and to the left of the signature is written, apparently in the handwriting of the testator, the words "in full of all demands of any nature or any kind to this day." I think, having regard to the facts in this case and the cheques themselves, that it is quite apparent that these payments had no relation to the claim of the plaintiff made in this action, and that the cheques were not intended and were not in fact receipts for the same, but had relation to other matters of a minor character between the parties.

The defendants relied upon the 4th section of the Statute of Frauds, and cited *Maddison v. Alderson* (1883), 8 App. Cas. 467, considered in *Evans v. Norris* (1912), 8 D.L.R. 652, and referred to in *McNeil v. Corbett* (1907), 39 Can. S.C.R. 608; *Herries v. Fletcher* (1914), 26 O.W.R. 553, 6 O.W.N. 587. All these cases were in regard to interests in land and have no application to the present case. The statute cannot be applied to the present case, unless it be shewn that it falls within that part of sec. 4 having reference to agreements made upon consideration of marriage or to that class of cases where a contract is not to be performed within a year. "Agreements consisting of mutual promises to marry are held not to be here intended: therefore they do not require written evidence under this statute." Leake on Contracts, 6th ed. (Canadian notes), p. 164. "By the Evidence Further Amendment Act, 1869, section 2, no plaintiff can recover a verdict for breach of promise unless his or her evidence is corroborated by some other material evidence of the promise." *ib.* "The contracts contemplated by the statute are those which are made in consideration of the marriage itself: *Lassence v. Tierney* (1849), 1 Macn. & G. 551." Agnew's Treatise on the Statute of Frauds, p. 121.

In *Kinzie v. Harper* (1908), 15 O.L.R. 582, it was held that a promise which by reason of the Statute of Frauds was unenforceable was sufficient consideration for a bill of exchange, citing *La Touche v. La Touche* (1865), 3 H. & C. 576, at p. 588.

As to the second point, that the agreement was not to be performed within a year: the statute includes those cases which are in terms incapable of being completely performed within a year. Contracts which may possibly be performed within the

year are not within the statute, as a contract to pay a sum of money to a person on the date of his marriage although the marriage does not take place within the year: *Peter v. Compton* (1694), *Skinner* 353, *Smith's Leading Cases*, 12th ed., vol. 1, p. 353. The effect of the statute has recently been considered in *Hanau v. Ehrlich*, [1911] 2 K.B. 1056, [1912] A.C. 39. Lord Alverstone, L.C.J., in the House of Lords, stated the rule deducible from the cases to be that, if there is no mention of time and the time is uncertain, the agreement is not within the statute; but, if the time is mentioned and is more than one year although there is power to determine it within the year, the agreement is within the statute.

In *Smith's Leading Cases*, 12th ed., vol. 1, p. 354, cases are collected shewing agreements which are held not to be within the statute: *Fenton v. Emblers* (1762), 3 Burr. 1278, 1281, where it is said the statute does not extend to cases where "the thing may be performed within the year;" and *Ridley v. Ridley* (1865), 34 L.J. Ch. 462; a contract to pay a wife a weekly sum for maintenance, *McGregor v. McGregor* (1888), 21 Q.B.D. 424; and other cases; the reason in all the above cases being that death might occur within the year.

I think that the statute does not apply in the present case, and that there is ample corroboration to satisfy the Evidence Act, R.S.O. 1914, ch. 76, sec. 12.

The result is that, while I am of opinion that the plaintiff cannot recover upon the document sued upon as a promissory note, she is entitled to recover, under the facts in this case, either upon the testator's contract to pay her \$10,000 or upon a *quantum meruit*; and, having regard to the whole circumstances of the case, after the best consideration that I can give it, I think \$10,000 a reasonable allowance. Although the defendants did not plead the Statute of Frauds, the question was argued and cases cited, and they should be allowed to amend their statement of defence, and the plaintiff should also be allowed to amend claiming for breach of contract or in the alternative for services on a *quantum meruit*, which I assess at \$10,000.

There will be judgment for \$10,000 with costs of action. It was properly contested by the defendants, who are entitled to costs as between solicitor and client out of the estate—the plaintiff's claim and costs to have priority.

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Municipal Corporations—Claim against Township Corporation for Injury to Sheep by Dogs—Owner Unknown—Dog Tax and Sheep Protection Act, R.S.O. 1914, ch. 246, secs. 17, 18—Dog Tax Collected but Sheep Valuers not Appointed—Ascertainment of Damage by Council—Proceedings of Council—Refusal to Continue after Passing of New Act, 8 Geo. V. ch. 46—Repeal of Former Act—Injury Occurring before Passing of New Act—Jurisdiction of Court under Former Act—Remedy by Mandatory Order to Council to Award Compensation—Order Issued in Action—Application of secs. 13 and 14 of New Act—Jurisdiction of Court to Award Compensation—Interpretation Act, sec. 15 (b).

On the night of the 1st and 2nd February, 1918, dogs attacked the plaintiffs' sheep upon a farm and severely injured many of them; the plaintiffs at once instituted and afterwards continued an inquiry as to the person who owned or kept the dogs, but were unable to find him. The corporation of the township in which the farm was situated had collected a dog tax, but the council had not exercised the power conferred by sec. 17 of the Dog Tax and Sheep Protection Act then in force, R.S.O. 1914, ch. 246, of appointing sheep valuers. The plaintiffs notified the Reeve of the township, and were invited to attend a meeting of the council to be held on the 4th February. One of them attended, told what he knew about the dogs and the injuries to the sheep, and made it plain that he expected compensation. A resolution was passed that the Reeve and two Councillors should inspect the sheep and take such action as they deemed necessary. The inspection was made on the 6th February, but it was impossible then to estimate the damages: some of the injured sheep had died, and it was expected that others might die, while some had a chance of recovery. It was accordingly arranged that the plaintiffs should attend at the next meeting of the council, to be held on the 4th March, and report on the then condition of the sheep. The plaintiffs did report at the March meeting, stating that 40 sheep were dead and that they expected that more would die. The settlement of the amount of damage was left in abeyance, and it was arranged that the plaintiffs should attend the April meeting. After the March meeting, a large number of sheep died, bringing the total up to 98. The plaintiffs attended meetings in April and May; at each meeting they made known the fact that they looked to the council to pay the damages; and by mutual consent the ascertainment of the amount to be paid was postponed. At a meeting held on the 1st July, the council purported to appoint sheep valuers for 1918, and passed a resolution that the council hold a special meeting on the 15th July, for the purpose of investigating the plaintiffs' claim. On the 5th July, the resolution for the special meeting was rescinded, and the Reeve informed the plaintiffs that the investigation could not be held, as the power to hold it had been taken away by the new Dog Tax and Sheep Protection Act, 8 Geo. V. ch. 46, which was assented to on the 26th March, 1918, and which repealed the Act R.S.O. 1914, ch. 246. Thereafter, the plaintiffs brought this action against the township corporation to compel payment of the amount of the damage sustained:—

Semble, that, if the case was to be dealt with entirely under the old Act, the Court had jurisdiction to order the council to award "for compensation a sum equal to the amount of the damage sustained"—that is, to award the mandatory order issuable in an action, not the prerogative writ (*Noble v. Township of Esqueving* (1917), 41 O.L.R. 400)—and, the council being satisfied that the plaintiffs had made diligent search and inquiry to ascertain the owner or keeper of the dogs, and that he could not be found, that was the only thing left for it to do: R.S.O. 1914, ch. 246, sec. 18; 6 Geo. V. ch. 56, sec. 3.

But *held*, that the provisions of the new Act, secs. 13 and 14, were applicable; and enabled the Court to give judgment for the plaintiffs for the amount of the damage.

That question was settled in favour of the plaintiffs by the provisions of sec. 15 (especially clause (b)) of the Interpretation Act, R.S.O. 1914, ch. 1, providing for the case where an Act is repealed and other provisions are substituted for those repealed.

As soon as the Act of 1918 came into force, the plaintiffs lost the right to compel the council to award compensation, and became bound to apply to the Court.

The right of action which arose on the 26th March, when the new Act received assent, still existed when the action was begun; and the Court had jurisdiction to pronounce judgment for the amount of the damages.

Judgment was given for the plaintiffs for the amount of their claim, which was found to be a reasonable one.

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ACTION by the owners of sheep injured and killed by the dogs of an unknown owner, to compel the defendants, the Municipal Corporation of the Township of Biddulph, in which township the sheep were killed, to pay the amount of the damage sustained.*

* At the time the damage was sustained, the Dog Tax and Sheep Protection Act, R.S.O. 1914, ch. 246, as amended by 6 Geo. V. ch. 56, was in force.

At the session of 1918, the Ontario Legislature passed a new Dog Tax and Sheep Protection Act, assented to on the 26th March, which, by sec. 19, repealed the Act in the Revised Statutes and all amendments thereto.

Sections 13 and 14 of the new Act are as follows:—

13. Where the owner of any dog killing, injuring, terrifying or worrying sheep is not known, the municipality in which such sheep were so killed, injured, terrified or worried shall be liable for compensation to the full amount of the damage sustained, but no municipality shall be so liable unless application has been made for damages as herein provided within three months after such sheep have been so killed, injured, terrified or worried.

14. The amount of damage sustained as aforesaid shall be determined in the following manner:

(1) The council of every local municipality shall appoint one or more competent persons to be known as Sheep Valuers. Within forty-eight hours after the discovery of any damage as mentioned in the preceding section, the owner of the sheep or the clerk of the municipality shall notify a sheep valuer, who shall immediately make full investigation and determine the extent of the damage. The sheep valuer shall make his report in writing, giving in detail the extent of the injury and the amount of damage done, to the clerk of the municipality, and shall at the same time forward a copy of such report to the owner of the sheep damaged.

(2) Where the owner of such sheep considers the award inadequate to cover the loss sustained, he may appeal to the Minister of Agriculture, who may name a competent arbitrator to make a further investigation and the award of the arbitrator so named shall be final; provided the appeal to the Minister shall be made within one week after the award of the local valuer has been received and shall be accompanied by a deposit of twenty-five dollars (\$25) which shall be forfeited if the award of the local valuer is sustained.

(3) When the amount of damage has been finally determined as aforesaid, the Treasurer of the municipality shall forthwith pay over to the owner of the sheep the amount so awarded.

(4) If no sheep valuers are appointed by the municipal council or the clerk or the sheep valuers do not perform the duties provided for by this section or any of them within the times specified, where the time is specified for the doing thereof, or where no such time is specified, within a reasonable time, the person who has sustained the damage shall have a right of action against the municipal corporation for the amount of the damage, recoverable in any court of competent jurisdiction.

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March 19, 20, 21, and 22. The action was tried by ROSE, J., without a jury, at London.

J. M. McEvoy, for the plaintiffs.

W. R. Meredith, for the defendants.

May 1. ROSE, J.:—The plaintiffs had, on the land of the plaintiff Hardy, in the defendant township, 130 sheep. On the night of the 1st and 2nd February, 1918, dogs attacked the flock and severely injured many of the sheep: some 23 were found lying on their sides and were at first thought to be dead: examination, however, shewed that they were not dead, and they were taken into the barn.

When the dogs got in, Hardy was at a neighbour's house: but they were still there when he returned home. When they saw him they ran away. He followed their tracks in the snow as far as they could be followed, and the next day he instituted, and thereafter he continued, an inquiry as to the person who owned or kept the dogs, but was unable to find him.

The township had collected a dog tax, but the council had not exercised the power conferred by sec. 17 of the Dog Tax and Sheep Protection Act then in force, R.S.O. 1914, ch. 246, of appointing sheep valuers. The plaintiff Hardy, as soon as the telephone exchange was open on the morning of the 2nd February, telephoned to the Reeve, telling him what had happened and asking him to come and see the sheep; and an appointment was made for the afternoon. At the appointed time, the Reeve and a Councillor came. They looked at the 23 sheep in the barn—4 of these were then dead, while others had their legs broken or were mangled—and also at some of those outside, particularly one which Hardy caught so as to exhibit injuries done to its legs. The Reeve then said that nothing could be done until the township council met, and he invited the plaintiffs to attend a meeting which was to be held on the 4th February. Hardy attended that meeting and told what he knew about the dogs and about the injuries to the sheep, and made it plain that he expected compensation; and a resolution was passed that the Reeve and two Councillors “go and inspect the sheep . . . which were killed and wounded by dogs and take such action as they may deem necessary and report the same to the clerk and have any advertising or such awards published as they may see fit.”

A few days later, on or about the 6th February, the Reeve and the two Councillors made their inspection. At that time, 7 of the 23 sheep in the barn were dead, and the opinion was expressed that others of the 23 would die; and a change for the worse was observed in the condition of the rest of the flock. Hardy is said to have expressed the opinion that with good care the sheep, other than the 23, would not die and that some of the 23 would live, and there is a suggestion that he was limiting his claim against the township corporation to a claim in respect of the 23, but, upon all the evidence, this suggestion appears to me to be quite absurd: apart altogether from the evidence of the plaintiffs, it is fully met by the admission of Phineas Dickens, one of the Councillors appointed to make the inspection, that on the day of the inspection he and his associates knew that if some of the sheep which were not in the barn were dead the next day they would be included in the claim.

It was obviously impossible to estimate the damages with any degree of accuracy on the 6th February, and the very reasonable course was adopted of arranging that the plaintiffs should attend at the next meeting of the council, to be held on the 4th March, and report on the then condition of affairs. They attended accordingly. There is some dispute as to what they reported: they say that 40 sheep were then dead, and that they so informed the council, while those of the Councillors who profess to remember say that the report was that 7 of the 23 were dead and that the sheep outside were getting along well. I do not know that any importance attaches to this discrepancy, but I think that the plaintiffs are more likely than the Councillors to remember what the fact was and what was said, and I accept their statement. It is, I think, quite certain that Hardy said that he expected that more sheep would die; that information was given, as on previous occasions, as to the price which the plaintiffs were to receive for the sheep from a man who had contracted to buy them; that the settlement of the amount of the damage was left in abeyance; and that it was arranged that the plaintiffs should attend the April meeting.

After the March meeting, a large number of the sheep died, bringing the total number of dead up to 98. The plaintiffs say that 96 had died before the meeting held on the 1st April, and

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that they so reported at that meeting. Again, there is a contradiction by some of the Councillors who think that it was not until a meeting held on the 31st May that there was any report that more than 18 had died. On some occasion the Reeve and a Councillor, at Hardy's request, inspected and counted the carcasses and found 98 dead: they say that this was in May, and that their report as to what they had seen was made at the meeting at which the plaintiffs for the first time informed the council that more than 18 were dead. As in the case of the difference as to the report made at the March meeting, I think the plaintiffs' evidence is probably accurate; but the important thing is that at every meeting the plaintiffs made known the fact that they looked to the council to pay the damages, and that by mutual consent the ascertainment of the amount to be paid was postponed.

At a meeting held on the 1st July, the council purported to appoint "sheep valuers for year 1918," and also passed a resolution that the council hold a special meeting on the 15th July, "for the purpose of investigating the Hardy and Hodgson claim for sheep killed by dogs," and that a subpoena be served upon witnesses, and that the township solicitor be asked to attend. On the 5th July, the resolution for the special meeting was rescinded, and, before the 15th July, the Reeve informed Hardy that the investigation could not be held, as the power to hold it had been taken away by the new Dog Tax and Sheep Protection Act, 8 Geo. V. ch. 46. This Act, which repeals ch. 246 of the Revised Statutes, was assented to on the 26th March, 1918.

During the spring of 1918, rumours were current to the effect that the plaintiffs had lost many sheep from disease or in a snow-storm, and I think it is clear that it was because of these rumours that the council hesitated to pay the claims without a thorough investigation. That investigation has now been had—not by the council, which seem to have been advised that it had no power to hold it, but at the trial of this action—and it appears to me to demonstrate that the rumours were without foundation, and that the plaintiffs' claim for \$2,805.60 (exhibit 4) is a reasonable one: indeed, if the plaintiffs had been free to leave their contract out of consideration, and—instead of taking the price at which they had agreed to sell the sheep and adding their expenses and deducting what it would have cost to keep the sheep until the time at

which they were to be delivered to the purchaser—had simply taken the market-value of the sheep at the time when they died, the evidence indicates that the claim would have been larger, the price of sheep having advanced after the plaintiffs made their contract. Why, then, the defendants persist in their refusal to pay, I do not know: certainly it is not because of any doubt that the plaintiffs “made diligent search and inquiry to ascertain the owner or keeper of” the dogs “and that he cannot be found” (R.S.O. 1914, ch. 246, sec. 18), for there is no such doubt, and the evidence is clear that there never was a suggestion of it at any of the meetings at which the plaintiffs were pressing their claim: but the refusal is persisted in, and the question for determination is, whether any, and, if any, what, relief can be given in this action.

The defendants’ point is that the worrying of the sheep occurred and the plaintiffs’ rights accrued while R.S.O. 1914, ch. 246, as amended by 6 Geo. V. ch. 56, was in force; and that the power of the Court is to be ascertained without reference to the new Act, which, as I have stated, came into force on the 26th March, 1918: they contend, therefore, that, if the plaintiffs are entitled to any relief, such relief must take the form of an order to the council to perform the duties cast upon it by the old Act; and they say that such an order can be made only by way of the issue of the prerogative writ of mandamus, and not by way of the mandatory order that is granted in an action.

If the practice suggested in the Divisional Court in *Eastview Public School Board v. Township of Gloucester* (1917), 41 O.L.R. 327, 40 D.L.R. 707, is to be adopted, the question whether the mandamus is to be granted by the issue of the prerogative writ or by an order in the action is not as important as the defendants’ argument would make it appear to be. Moreover, it has been stated in a Divisional Court in *Hogle v. Township of Ernesttown* (1917), 41 O.L.R. 394, 41 D.L.R. 123, and decided by the Chief Justice of the Exchequer in *Noble v. Township of Esquesing* (1917), 41 O.L.R. 400, 41 D.L.R. 99, that the relief which is required where a municipal council fails to perform the duty cast upon it by R.S.O. 1914, ch. 246 (at least after there has been a report by a sheep valuer), is relief which can be obtained in an action against the municipality. The only distinction between *Noble v. Town-*

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ship of Esquesing and this case is that in the *Noble* case there had been a report by valuers, whereas in this case there could be no such report, because there were no valuers—which appears to me to be a distinction without a difference: in that case, as in this, what was required was to compel the council to perform its statutory duty of awarding damages. I think, therefore, that the *Noble* case binds me to hold that the appropriate remedy here is the mandatory order which is issuable in an action—and not the prerogative writ which is required where, e.g., an unincorporated body, like a board of health, fails to perform the duty of making a requisition upon the municipality for the amount required to pay for services performed under its direction: *Rich v. Melancthon Board of Health* (1912), 26 O.L.R. 48, 2 D.L.R. 866.

Thus it appears to me that I am not without jurisdiction, even if the case is to be dealt with entirely under the old Act; and I proceed to the consideration of the question whether I am to order the council to award “for compensation a sum equal to the amount of the damage sustained”—which, as the council has been satisfied that the plaintiffs have made diligent search and inquiry to ascertain the owner or keeper of the dogs, and that he cannot be found, is the only thing left for the council to do under the old Act: R.S.O. 1914, ch. 246, sec. 18; 6 Geo. V. ch. 56, sec. 3—or whether the provisions of the new Act are available, so that I may give judgment for the amount of the damage.

The question as to the applicability of the new Act appears to me to be settled in favour of the plaintiffs by sec. 15 of the Interpretation Act, R.S.O. 1914, ch. 1, which provides for the case which we have here, viz., the case where an Act is repealed and other provisions are substituted for those repealed. As this section contains words, hereinafter quoted, which seem exactly to fit the case in hand, it is unnecessary to consider the authorities referred to by counsel in the discussion of the question whether the changes made by the new Act are mere changes in procedure, which, apart altogether from the Interpretation Act, will be construed as retroactive, or are changes in the substantive rights conferred upon persons whose sheep are killed or injured by the dogs of unknown owners. Two remarks may, however, be made. The first of these is that the Interpretation Act in force in England, 52 & 53 Vict. ch. 63, while it con-

tains a section—38—very like sec. 14 of the Ontario Act, laying down rules to be followed where an Act is repealed, but no provisions are substituted, does not contain a section like sec. 15 of the Ontario Act; and, therefore, that English cases which seem to tell against the right of the plaintiffs in this case to resort to the new Act of 1918, are to be very cautiously applied. The second remark is that there is a great deal to be said in favour of Mr. McEvoy's contention that the only changes made by the Act of 1918 are changes in procedure. This need not be elaborated: it suffices to say: (a) that, although the old Act confers a right to compensation only upon the owner of sheep *killed* or *injured*, while the new Act confers it upon the owner of sheep *killed, injured, terrified* or *worried*, there is here a mere amplification of expression, without any real enlargement of the right: for under the new Act, as under the old, the right is to receive compensation to the amount of the damage sustained—and the owner does not sustain damage by the terrifying or worrying of his sheep unless the sheep are thereby injured; so that any terrifying or worrying which will give rise to a right to compensation under the new Act would have given rise to a similar right under the old Act; and (b) that, if there is any change in the substantive right, it seems to consist merely in this: that under the old Act, but not under the new, a condition precedent to the right of the owner to receive compensation is that the council shall be satisfied that he has made diligent search and inquiry to ascertain the owner or keeper of the dog—unless, indeed, the substitution of the valuers, if there are any, or of the Court, for the council, as the body to award the compensation, is a change in the right and not merely a change in what the new Act calls the manner of determining the amount of damage: *Colonial Sugar Refining Co. v. Irving*, [1905] A.C. 369.

The words of sec. 15 of the Interpretation Act which appear to fit the case in hand are to be found in clause (b). The section, as has been stated, applies where an Act has been repealed and other provisions have been substituted for those repealed, and clause (b) enacts that, in such case, "all proceedings taken under the . . . enactment . . . repealed . . . shall be taken up and continued under and in conformity with the provisions so substituted, so far as consistently may be." The "proceeding taken" in this case, before the Revised Statute was repealed, was the

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making of an application to the council of the defendant municipality for an award of compensation. Upon that application the plaintiffs had satisfied the council that they had made diligent search and inquiry to ascertain the owner or keeper of the dogs and that he could not be found: that fact is, as I have stated, quite plain upon the evidence, and the only denial of it is in the statement of defence. There had been no report by a sheep valuer—because there was no sheep valuer—and the next step to be taken in the proceeding would have been the ascertainment by the council of the amount of the damage—a step which, as has been mentioned, the council prepared to take, but, upon being advised, and, as I think, accurately advised, of the effect of the new Act, decided not to take. The new Act requires that next step, the ascertainment of the amount of the damage, to be taken by the Court in an action (if, as here, there is no sheep valuer to take it); and, as the Interpretation Act enacts that the proceedings shall be taken up and continued under and in conformity with the provisions of the new Act, there was nothing for the plaintiffs to do but to commence their action; that is to say, as soon as the Act of 1918 came into force the plaintiffs lost the right to compel the council to award compensation, and became bound to apply to the Court.

It has been noted that on the 1st July, 1918, more than three months after the new Act came into force, sheep valuers were appointed for the year 1918. If the new Act had been in force when the damage was discovered, and if there had then been sheep valuers, the clerk of the municipality or the plaintiffs would have been required to notify one of such valuers within 48 hours; and, if the notice had not been given within the 48 hours, or within such further time as sec. 18 might have allowed, the plaintiffs, apparently, would have had no cause of action against the township corporation. But, if from the 26th March until the 1st July the plaintiffs had a right of action, it is difficult to see how they lost it by failing to give notice to one of the valuers within 48 hours after his appointment on the 1st July, even if notice then given would have conferred jurisdiction upon the valuer—which is, at least, very doubtful—and it is still more difficult to see how the defendants can now take advantage of the fact that the plaintiffs, taking them at their word, rested under the belief that the damages

were to be assessed at the special meeting of the council called for the 15th July, and took no steps to have them assessed by any one other than the council. I think that the right of action which arose on the 26th March still existed when the writ was issued, and that there is jurisdiction to pronounce judgment for the amount of the damages.

While I have rested the case upon sec. 15 (b) of the Interpretation Act, I do not wish to be understood as deciding against the applicability of sec. 15 (c), which enacts that “. . . in the enforcement of rights existing or accruing under the Act . . . repealed . . . or in any other proceeding in relation to matters which have happened before the repeal . . . the procedure established by the substituted provisions shall be followed so far as it can be adopted.” If my reading of sec. 15 (b) is correct, there is no need to discuss sec. 15 (c), nor to consider whether it is to be read as authorising or requiring the adoption of the substituted procedure in dealing with rights springing from events which happened before the change in the legislation, only if those rights are precisely the same as the rights which, under the substituted provisions, would have sprung from the same events if they had happened after the change in the legislation.

There will be judgment in favour of the plaintiffs for \$2,805.60, with costs.

[CLUTE, J.]

McPHERSON v. GILES.

Landlord and Tenant—Lease of Farm—Action by Landlord for Breaches of Covenants—Failure of Claims for Want of Repair and Bad Husbandry—Claim for Breach of Covenant “not to Cut down Timber”—Expansion by Short Forms of Leases Act—Exception—“Firewood”—“Clearance”—“As herein Set forth”—Effect of Punctuation of Statute—Felling of Timber Trees for Firewood—Injury to Reversion—Waste—Injunction—Pleading—Judicature Act, sec. 17—Damages—Forfeiture—Relief against—Landlord and Tenant Act, sec. 20—Terms—Default—Forfeiture of Right of Renewal of Lease—Costs.

By an indenture, purporting to be made under the Short Forms of Leases Act, R.S.O. 1914, ch. 116, the plaintiff leased a farm to the defendant for two years from October, 1917, with a right of renewal for three years more, at the option of the defendant. The plaintiff brought this action to recover damages for breaches of covenants in the lease and for a declaration of forfeiture:—

Held, that, though a small part of the land was not ploughed 6 inches deep, as required by the lease, there was no evidence that the plaintiff's reversion would, at the expiration of the lease, be damaged or depreciated in value; and the plaintiff's claim upon that ground was dismissed.

Rose, J.

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May 7

- 1919 The claim that the house was not kept in repair was not pressed and was also dismissed.
- McPHERSON v. GILES. The covenant "not to cut down timber" was expanded, by force of the Short Forms of Leases Act, into a covenant not at any time during the term to cut down or destroy, "without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs, or firewood, or for the purpose of clearance as herein set forth." There was nothing in the lease setting forth what timber trees might be cut for repairs, firewood, and clearance:—
- Held*, that the words "as herein set forth" applied to the exception; and the exception was inapplicable in this case.
- Quære*, whether the words "as herein set forth" referred only to "clearance" or to "repairs" and "firewood" also. The rule that punctuation is not conclusive referred to.
- The defendant in fact cut down for firewood 51 trees, 48 of which were timber trees, and pleaded the consent of the plaintiff therefor:—
- Held*, upon the evidence, that the defendant had no leave or license to cut the timber so cut or any timber upon the farm.
- The defendant could not justify his acts under the exception in the covenant: they were unnecessary and were not authorised either by the terms of the lease or by any consent given orally.
- The defendant's acts were injurious to the reversion and amounted to "waste." Review of the authorities.
- Although an injunction was not asked for in the pleadings, it was asked for at the hearing, and should, under sec. 17 of the Judicature Act, R.S.O. 1914, ch. 56, be granted, to restrain apprehended waste or trespass.
- Under sec. 20 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, the plaintiff gave notice to the defendant of the breaches complained of, and claimed \$400 damages:—
- Held*, that a forfeiture should be declared, but that, under the discretion given to the Court by sec. 20, relief against the forfeiture should be granted to the defendant upon payment of \$320 and the costs of the action.
- In default of payment at a time fixed, the forfeiture should be enforced and should include the defendant's right to an extension of the term.
- The plaintiff should have County Court costs without a set-off, except in respect of the issues as to the breaches of the covenants to repair and plough; the extra costs incurred by the defendant in respect of these issues to be set off against the plaintiff's costs.

ACTION by a landlord against his tenant to recover damages for breaches of covenants in the lease and for other relief.

April 23. The action was tried by CLUTE, J., without a jury, at Welland.

L. B. Spencer, for the plaintiff.

J. S. Davis, for the defendant.

May 7. CLUTE, J.:—The action is brought upon a lease dated the 23rd July, 1917, from the plaintiff to the defendant, of a farm, the plaintiff asking for damages for breach of covenants: first, in respect of the house, which it is alleged was injured and damaged and not kept in repair; second, under the covenant to work the farm in a husbandlike manner, alleging that the ploughing was not 6 inches deep as provided in the lease; third, for the cutting of green and standing timber.

With respect to the house, the charge was not pressed, and I find in favour of the defendant upon that ground. As to the second covenant: a certain small quantity of land was not in fact ploughed 6 inches deep, but the evidence did not satisfy me that there was any injury to the reversion.

The lease was for two years certain, from October, 1917, with right of renewal for three years more by the defendant. There was no evidence that the plaintiff's reversion would, at the expiration of the lease, be damaged or depreciated in value; and the claim upon that ground is also dismissed. This much was intimated at the trial.

The remaining ground as to the covenant not to cut down timber requires further consideration.

The lease purports to be made under the Short Forms of Leases Act, R.S.O. 1914, ch. 116, and contains a covenant "not to cut down timber," which in column 2 of schedule B. of the Act reads:—

"And also will not at any time during the said term hew, fell, cut down or destroy, or cause or knowingly permit or suffer to be hewn, felled, cut down, or destroyed, without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs, or firewood, or for the purposes of clearance as herein set forth."

This was first referred to and relied upon by the defendant's counsel on the argument at the close of the case.

The effect of this extended clause is that under the statute it has the same effect as if it contained the form of words contained in column 2: it is a covenant "not to cut down timber" with an exception "as herein set forth." The question naturally arises, do these words, "as herein set forth," refer to the word immediately preceding, "clearance," or to each word separately, or else to "repairs" or "firewood," or have they reference to some other part of the lease, describing what repairs and what firewood and what portion of the woods for clearance. It may be urged that the words "herein set forth" have reference to the lease, and not to this particular section, and in that case, inasmuch as the lease does not set forth the nature of the repairs, or the particulars of the firewood required, or the portion of the land indicated under the word "clearance," the exception does not come into operation at all. See Broom's Maxims, 8th ed., p. 528.

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The exception includes "repairs" or "firewood" or "clearance," and the words "herein set forth" evidently have reference to the exception.

A somewhat similar case is referred to in Craies' Statute Law, 2nd ed., p. 549 (appendix A.), *In re Cambrian R.W. Co.* (1868), L.R. 3 Ch. 297, where the words "hereinbefore contained" were held to be ambiguous, and might mean "before contained in this Act," or "before contained in this section," and which of the two meanings is the proper one must be discovered "from the context and the general scheme of the Act."

The fact that there is a comma after the word "firewood" and none after the word "clearance" is not conclusive as to the construction to be placed upon it.

In *Stephenson v. Taylor* (1861), 1 B. & S. 101, 106, Cockburn, C.J., said: "On the Parliament Roll there is no punctuation, and we, therefore, are not bound by that in the printed copies:" Craies' Statute Law, 2nd ed., p. 198. See also *Duke of Devonshire v. O'Connor* (1890), 24 Q.B.D. 468, which turned on the construction of an enclosure Act. In that case it was a question of the effect of brackets. Lord Esher, M.R., said: "To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops." Craies, p. 198, says: "It does not appear that any definite rule can be laid down as to this; but, as Dwarris says as to this point (2nd ed., p. 601), 'the intention must be collected from the context to which the words relate,'" and refers to a number of cases to illustrate this.

While inclined to the view that the statute in the present case does not introduce an exception, from the fact that nothing is set forth in the lease shewing what timber trees may be cut for repairs, firewood, and clearance, in the view I take it is unnecessary to decide this point.

The defendant did, in fact, cut down in the centre of the bush 51 trees. The defendant does not plead the right under the lease to cut the trees, but pleads "the consent of the plaintiff in consideration of the plaintiff being allowed to cut wood and timber for himself, which he did."

The trees cut by the defendant are: 33 beech, 10 hard maple, 5 soft maple, 1 cherry, and 1 ironwood.

I find that the beech and maple trees, 48 in all, are timber trees, and that in the cutting of them the defendant committed waste unless he is protected under the exception; and I find that the defendant cut these trees for firewood.

The bush proper consisted of about 20 acres, which had been carefully preserved and used as a sugar bush, the underbrush being cut, and it was greatly valued by the plaintiff for that purpose as well as for a preserved wood intended for timber. There were also from 18 to 20 acres of what may be called partly cut and slashed woods quite distinct from but adjoining the preserved portion of woods. The plaintiff was in the habit of getting his firewood from this portion. From the evidence I find that neither party understood or appreciated the effect or knew of the extended form of the clause in the lease, but considered only the short form of the covenant "not to cut down timber." The defendant said he would not have cut the timber but that from a conversation that took place after he had leased the premises he understood that the plaintiff had given him liberty to do so. The plaintiff, desiring to take some wood from the slashed portion of the premises for his own domestic use, applied to the defendant for leave to do so and told the defendant that it did not make any difference to him (the defendant) what the plaintiff took: he might cut down the whole of the woods for that matter if he left enough for the defendant.

The plaintiff denies these words, and I am satisfied that he never intentionally or in fact verbally gave the defendant leave to cut the timber, but simply obtained leave for himself to take some wood off the place for his own use.

It is quite clear, from the defendant's own statement of what took place, that no leave or license was given him to cut the timber in question or any timber.

The question still remains as to the effect of the exception under the lease. I have looked in vain for a direct authority upon the point. Many of the trees cut were large, straight trees, very valuable as timber trees in the present market. They were in the centre of the bush upon a knoll, and the removal of the trees let the sun into the sugar bush and depreciated the value of the rest of the bush as a sugar bush. The cutting of them was reckless, negligent, and without exercise of

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reasonable care such as a prudent farmer would exercise, and it depreciated the value of the reversion at the expiration of the lease by at least \$350.

In my view, the defendant cannot justify his acts in the cutting of this timber under the exception in the covenant. They were wholly unnecessary and unauthorised either verbally or within the terms of the lease: he did not suppose he had the right to cut down any timber; and I find that it was not part of the agreement between the parties that the defendant might cut any timber or other trees in that portion of the woods known as the sugar bush; and, if necessary, the lease should be reformed in that respect. There was plenty of fallen and standing dead timber from which he could have supplied himself with all the firewood required by him; even had there been a shortage in that respect, there was green timber in the slashed-over portion more than sufficient for his purpose. Having regard to the condition of the bush, underbrushed and obviously kept as a sugar bush, it is difficult for me to understand his act as being other than wilfully destructive. Assuming that he is honest in his statement that he believed that he had verbal authority to do as he did, I think it clear that he had no such authority, express or implied.

The authorities bearing upon the question of waste are very fully collected in *Campbell v. Shields* (1879), 44 U.C.R. 449, and in *Drake v. Wigle* (1874), 24 U.C.C.P. 405.

In the *Campbell* case there was a covenant as follows: "The said lessor is hereby allowed to enter upon said demised premises at any time, and to cut and remove any or all timber he may wish." The lease also professed to be made under the Short Forms Act, with a covenant "not to cut down timber." Hagarty, C.J., thought that there was not much practical difference between the actual words used in this lease and the expanded covenant in the statutable form. It was held a question for the jury whether the tapping of trees for sugar-making has the effect of destroying the trees, or of shortening their life, or injuring them for timber purposes; and, if so found, a covenant not to cut down timber except for the lessee's use, or for purposes of improvement on the premises, will be broken by such tapping.

Whatever does lasting damage to the freehold is waste: *Phillipps v. Smith* (1845), 14 M. & W. 589. It would seem that

in gross cases vindictive damages may be given, but in general the measure of damage is the diminution in the value of the reversion, less an allowance for immediate payment: *Whitham v. Kershaw* (1885), 16 Q.B.D. 613; see Fawcett's *Landlord and Tenant*, 3rd ed., pp. 348, 349, and 377.

"'Waste' is a spoil or destruction in houses, gardens, trees or other corporeal hereditaments to the disherison of him in remainder or reversion, &c., or to the prejudice of the heir or reversioner: 1 Co. Litt. 53:" per Hagarty, C.J., in the *Drake* case, 24 U.C.C.P. at p. 413.

"There is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burdens upon it, or, thirdly, by impairing the evidence of title:" notes to *Greene v. Cole* (1671), 2 Saund. 228, Wms. Saund., ed. 1871, vol. 2, p. 651, referred to by Hagarty, C.J., in the *Drake* case (p. 413). He also refers (at p. 417) to *Taylor v. Taylor* (1831), not reported, Rob. & Har. Dig., tit. "Waste," p. 448, to the effect that an action of waste might be brought under 6 Edw. I. ch. 5; "and where land was devised for life, with a reservation of the oak timber thereon, it was held that a power to dispose of other descriptions of timber was not thereby implied, and that the tenant for life was guilty of waste in disposing of such other timber."

After referring to numerous authorities, Hagarty, C.J., in the *Drake* case, at p. 419, says:—

"It seems to me on all the authorities that 'Waste' is a flexible term varying with local and other circumstances; that its essence is injury to the reversion; and that, if there be no damage thereto, especially in the action on the case for waste, there can be no recovery."

The covenant is broken if more timber is cut than is sufficient for the required purposes. In the present case it appeared that a large number of the timber trees were cut and lay upon the ground, and were not used for firewood. There was no evidence given in respect to this point, but it would seem that more was cut than was necessary for the purpose: see *McMullen v. Vannatto* (1894), 24 O.R. 625.

In the United States, whether the cutting of any kind of trees is waste depends upon the question whether the act is such as a

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prudent farmer would do, having regard to the land as an inheritance, and whether the doing of it would diminish the value of the land as an estate: 40 Cyc., p. 508.

The right to cut firewood must be exercised in the usual manner, and cannot be extended to the use of the more valuable timber for other purposes, and does not include the right to cut such timber into logs, and with the proceeds buy fuel, so long at least as there is an abundance of fuel timber: *ib.*, pp. 511, 512, foot-note; *Hogan v. Hogan* (1894), 102 Mich. 641.

Although an injunction was not asked in the pleadings, it was asked for at the trial; and, under sec. 17 of the Judicature Act, R.S.O. 1914, ch. 56, it may be granted where asked for at or after the hearing, to prevent any apprehended waste or trespass. I think it a case where an injunction should be granted restraining the defendant from cutting standing green trees or timber for firewood within what is termed "the woods," being that portion of the uncleared land set apart for a sugar bush.

The Landlord and Tenant Act, R.S.O. 1914, ch. 155 (sec. 20, sub-sec. 2), gives large discretion to the Court in granting relief against forfeiture: it provides that a breach of any covenant or condition, other than a proviso in respect of the payment of rent, shall not be enforceable unless the lessor has given notice of the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and the lessee fails, within a reasonable time, to remedy the breach and make reasonable compensation.

In the present case notice was given by the plaintiff claiming as damages \$400. Sub-section 3 provides that the Court may grant such relief as under all the circumstances the Court thinks fit as to damages, compensation, etc., including the granting of an injunction to restrain a like breach in the future.

I think the proper judgment in this case is that a forfeiture should be declared, but that relief should be granted to the defendant upon payment of \$350, less \$30 allowed the defendant for removal of the garage by the plaintiff, within 10 days prior to the expiry of the first two years of the term of the lease, and upon payment of such sum, together with the costs of this action, the defendant shall be relieved from the forfeiture. In default of payment the forfeiture shall take place and shall include in it the

defendant's right for an extension of the lease for three years as provided therein.

The result is that there will be judgment for the plaintiff and damages assessed at \$320; that the lease shall be declared forfeited, but that relief shall be extended to the defendant upon the payment of the said \$320 on or before 10 days prior to the expiry of the first two years of the lease, and in default of such payment the forfeiture shall take effect; and that the plaintiff's action in respect of the claims for damages for breaches of the covenants relative to the house and the ploughing, is dismissed. An injunction will be granted to restrain the defendant from a like breach in the future.

The plaintiff is entitled to County Court costs without a set-off, except in respect of the issues as to the breaches of the covenants to repair the house and to plough the land 6 inches deep; the extra costs incurred in this respect by the defendant to be set off against the plaintiff's costs.

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[APPELLATE DIVISION.]

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SHILSON V. NORTHERN ONTARIO LIGHT AND POWER CO.
LIMITED.

March 15.

May 8.

Negligence—Wires Charged with Electricity Placed Close to Pipes Conveying Compressed Air—Infant Walking on Pipes Injured by Electric Shock—Dangerous Places—Barricades—Printed Notices Warning Persons of Danger—Evidence—Findings of Jury—Indication in Notice of Particular Danger.

The plaintiff, a boy, was injured by an electric shock when walking on a pipe-line of the defendants, a company engaged in the production, transmission, and sale of electricity and compressed air. At the trial of an action to recover damages for his injuries, the jury found, in answer to questions: (1) that the plaintiff was not on the line with the knowledge or permission of the defendants; (2) that children and other persons were not in the habit of walking on the pipe-lines to the knowledge of the defendants; (4) that children or others were not in the habit of walking on the lines at the place where the accident occurred; (6) that the plaintiff was aware that the barricade and notice thereon were intended to warn persons not to walk on the pipe-lines at that place; (7) that in the construction or maintenance of their lines the defendants were guilty of negligence which caused the accident; (8) that such negligence consisted in the electric wires being too close to the pipes:—

Held, that the 4th finding was conclusive against the plaintiff.

The principle upon which *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229, was decided, was in that case pressed to the utmost limit.

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Held, also, that, if the 4th finding was not in the plaintiff's way, there was nothing, upon the evidence, which the defendants could or ought to have done which they failed to do: they surrounded the dangerous places with barricades and put up notices, which indicated why they were placed; the plaintiff saw these notices, was able to read them, and knew that it was dangerous to go into a barricaded place.

Per MEREDITH, C.J.O.:—The argument that if the plaintiff did not know of the existence of the danger from the wire, the warning was only a warning against the danger of slipping off the pipes, was answered in this way: if the warning were against the danger of slipping, there would have been notices all along the lines, but in fact it was only at the dangerous spots that these notices were placed.

Judgment of MASTEN, J., dismissing the action, affirmed.

ACTION by Raymond Shilson, an infant, suing by his next friend, to recover damages for injuries sustained from an electric shock when he was walking upon one of the defendants' pipe-lines.

By his statement of claim the plaintiff alleged:—

2. That the defendants were an incorporated company, engaged in the production, transmission, and sale of electricity and compressed air for power and light purposes.

3. That the defendants' plants for generating and producing the electricity and compressed air were situate on the Montreal and Matabitchouan rivers, several miles south-easterly from the town of Cobalt, and the electricity was transmitted by wires strung on poles, and the compressed air was conducted through iron pipes placed above the surface of the ground from the said plants to the town of Cobalt, with branches of each running to various mines between the plants and the town. The wires and pipes passed through what was known as "Gillie's Limit."

4. That on the 31st July, 1917, the plaintiff was walking along one of the said branch-pipes of the defendant company upon or near the property known as the "Provincial Mine," situate at or near the boundary-line between the said Gillie's Limit and the township of Coleman, where it crossed a shallow ravine, and, while so walking, came in contact with an electrical transmission wire belonging to the defendants. The transmission wire was heavily charged with electricity and crossed the pipe at right angles, between 3 and 4 feet above the surface of the pipe.

5. That, as a result of coming into contact with the said high-power transmission wire, the plaintiff was knocked off the said pipe to the ground, a distance of 12 feet, and was badly bruised and injured by the fall, and his face, body, and feet were severely burned by the electricity, with the result that his face is badly

disfigured, parts of his feet have had to be amputated, and he is permanently crippled and disabled.

6. That the defendants well knew that the public were accustomed to walk along the said pipes in the locality where the plaintiff was injured, and the defendants were negligent in not properly guarding the said pipes, and were further negligent in constructing and maintaining the said high-power transmission wire in such close proximity to the said pipe, and in not properly guarding the said wire to prevent the possibility of coming in contact therewith.

7. That the plaintiff had been ill and suffered continually since he sustained the said injuries, heavy medical and other expenses had been incurred, and the plaintiff would always be prevented from engaging in manual work or exercises.

The plaintiff claimed \$5,000 damages.

The defendants denied negligence and alleged that the plaintiff's injury was due to his own negligence, particularly in disregarding danger-signs and warnings put up by the defendants at or near the place where the plaintiff was injured.

The action was tried before MASTEN, J., and a jury, at Haileybury.

Questions were left to the jury, and these with the jury's answers thereto were as follows:—

1. Was the plaintiff on the pipe-lines where the accident occurred with the knowledge or permission of the defendants?

A. No.

2. Were children and other persons in the habit of walking on the defendants' pipe-lines to the knowledge of the defendants?

A. Yes.

3. If so, did the defendants object or seek to prevent it? A. No.

4. Were children or others in the habit of walking on the defendants' pipe-lines at the place where the accident occurred?

A. No.

5. If so, were the defendants aware of the practice? A. No.

6. Was the plaintiff aware that the barricade and notice thereon were intended to warn persons not to walk on the pipe-lines at that place? A. Yes.

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7. In the construction or maintenance of their lines were the defendants guilty of any negligence which occasioned the accident?

A. Yes.

8. If so, in what did such negligence consist? A. In the electric wires being too close to the pipes.

9. If you find that the defendants are liable, at what sum do you assess the damages? A. (1) To the infant plaintiff, \$2,500.

(2) To the father, \$410.

W. A. Gordon and J. B. Allen, for the plaintiff.

R. S. Robertson, for the defendants.

March 15. MASTEN, J.:—At the close of the plaintiff's case, counsel for the defence moved for a nonsuit, and the hearing of that motion was enlarged until after the evidence for the defence had been put in and the case had gone to the jury. The motion was then renewed.

Notwithstanding the very able argument of Mr. Allen in answer to the motion for a nonsuit, I am of opinion that it must succeed.

Without determining whether the plaintiff was a trespasser or a licensee when walking upon the pipe-line of the defendants, I find that the evidence adduced failed to disclose any duty owing to the plaintiff by the defendants which they failed to observe and perform. There was no evidence proper to be submitted to the jury in support of question No. 7, or upon which they could find as they have. Consequently the motion for a nonsuit must be allowed, and the action dismissed with costs, if demanded. I trust, however, that the defendants may see their way to forgo their claims for costs.

The plaintiff appealed from the judgment of MASTEN, J.

May 8. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

A. G. Slaght, for the appellant, argued that the answer of the jury to the 7th question was broad enough to fix liability on the defendants. [MEREDITH, C.J.O., said that, in his opinion, it would be an enormity to fix liability on the defendants, inasmuch as they owed no duty to the appellant which they had failed to discharge.]

[MAGEE, J.A., referred to *Jenkins v. Great Western Railway*, [1912] 1 K.B. 525.] The jury in effect found that the boy was in a place where it was proper for him to be, and the question whether he was so was a question for the jury, as stated by King, J., in *Makins v. Piggott & Inglis* (1898), 29 Can. S.C.R. 188, at p. 192. [MEREDITH, C.J.O., thought that the case at bar was similar to the *Jenkins* case.] Reference was made to the following cases: *Hayes v. Southern Power Co.* (1913), 78 S.E. Repr. 956; *Jewson v. Gatti* (1886), 2 Times L.R. 381, 441; *Harrold v. Watney*, [1898] 2 Q.B. 320; *Robinson v. Village of Havelock* (1914), 32 O.L.R. 25, 20 D.L.R. 537. The cases are collected and discussed in *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229, and *Latham v. R. Johnson & Nephew Limited*, [1913] 1 K.B. 398. Here the boy knew he might slip, or fall off, but he did not know or have warning of the concealed danger which was the real menace. He was not a trespasser, any more than the defendants were, who did not own the land on which their pipe, a mere chattel, was placed.

R. S. Robertson, for the respondents, the defendants, was not called upon.

MEREDITH, C.J.O. (at the conclusion of the argument for the appellant):—The fatal difficulty in the way of the success of this appeal is that the jury have found that boys were not in the habit of frequenting the place where this boy was when he was injured. That seems to me to be conclusive against the appellant. The only ground upon which the respondent company could be made liable would be upon the application of the principle of such a case as *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229, where on the premises of a person there is something which is dangerous to children who resort there to play, and it is known to the person that children do resort there. That doctrine has, in my judgment, been pressed in that case to the utmost limit.

Then, if that difficulty were not in the way, I do not see what the respondents could or ought to have done that they failed to do. The places on their line which are dangerous they took pains to surround with barricades, and they put up notices with large letters upon them, and they also indicated by the notices why they were placed. The boy saw these notices, was able to read them; he was

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an intelligent boy and knew that it was dangerous to go into the enclosure surrounded by the barricade.

Now, as far as I am concerned, I cannot follow the argument that, if he did not know of the existence of the danger from the wire, he was only warned against the danger of slipping off the pipes. What seems to me to be a complete answer to that is that, if that were the case, there would have been notices all along the pipe-line, but it was only at these dangerous places that the notices were put. What the respondents did was just the same as if they had a patrolman who said "Don't go over into that enclosure, it is dangerous to go there," and it shocks my common sense to think that a boy or other person who has been warned in that way and chooses to go there, and is injured by something that he did not expect to find, should be entitled to recover.

The appeal is dismissed without costs.

MACLAREN, J.A.:—I cannot quite agree with the learned Chief Justice in the latter part of his deliverance. I concur in the result.

MAGEE and HODGINS, JJ.A., also concurred.

Appeal dismissed without costs.

[APPELLATE DIVISION.]

HOLLAND v. TOWN OF WALKERVILLE.

1918

Dec. 17.

1919

May 8

Municipal Corporations—Negligence—Injury to Building in Town by Water—Town Corporation Permitting other Buildings to be so Constructed as to Cause Flow of Water—Excavation Made by Plaintiff in Highway—Justification under Alleged License—Power of Corporation to Give License to Interfere with Highway—Municipal Act, secs. 406a., sub-sec. 3 (a), 483—Unlawful Act of Plaintiff Rendering Flow of Water Injurious to Him.

The plaintiff sued the town corporation to recover damages for injury to a building erected by him in the town, by reason, as he alleged, of water caused to flow into an alley along the side of which a wall of his building was erected; he alleged that the corporation was negligent in permitting other buildings to be so constructed as to cast water upon the alley in considerable volume. When the plaintiff began to build, he excavated the soil of the alley and of the street upon which his building fronted, for some distance beyond his property line—asserting that he was licensed by the corporation to do so:—

Held, that there was no authority in the corporation to give a license to the plaintiff to interfere with the highway: secs. 406 a., sub-sec. 3 (a), and 483 of the Municipal Act, R.S.O. 1914, ch. 192, shew that the power of the corporation is limited to giving a right to put up a “hoarding” for the storage of materials; it is a limited right, and practically excludes any idea of conferring power to do any more than that.

Seemle, if there had been power in the corporation, no proper license was given to the plaintiff to do what he did.

It was by reason of the unlawful act of the plaintiff himself that what happened became injurious to him.

Judgment of MIDDLETON, J., dismissing the action, affirmed.

ACTION for damages for injury to the plaintiff’s building, in the town of Walkerville, by water, caused, as the plaintiff alleged, by the negligence of the defendant town corporation.

November 25, 1918. The action was tried by MIDDLETON, J., without a jury, at Sandwich.

J. H. Rodd, or the plaintiff.

R. L. Brackin and John Sale, for the defendant corporation.

December 17. MIDDLETON, J.:—Holland owned land at the corner of Assumption street and Lincoln road in Walkerville. On this he erected a large building with stores below and flats above, extending east along the south side of Assumption street from Lincoln road to an alley in the rear. Early in the construction, the rear wall along the alley fell in, and had to be rebuilt, and then fell in a second time, and was again rebuilt. It is said that this was caused by rain and surface water which were caused to flow into the alley by reason of the pavement constructed by the municipality upon Assumption street and by water cast upon the alley from adjoining buildings across the alley—that the “corporation was negligent in permitting the buildings to be constructed so as to cast waters upon the alley in considerable volume.”

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When the claim was first put forward, it was alleged that the wall had been carried away three times, and not twice, and traces of this dishonesty persist in the evidence put forward at the trial.

I have come to the conclusion that the view I expressed at the trial should prevail, and that the falling of the wall is not to be attributed to anything for which the municipality is responsible.

When Holland started to build, he intended the brick foundation wall to go to the boundary of his property; and, to enable this to be erected, he, without any colour of right, excavated the soil of the street and the alley some distance beyond his property line. On the alley side some soil fell in and had to be removed; and, when the wall was built, he filled in earth in this excavation. This earth, lacking cohesion when wet, exerted very substantial pressure inward upon the wall, which was not fully hardened and which lacked weight and support, and so it fell. The cause was satisfactorily given by the defendant corporation's witnesses.

Assumption street is graded downward from the lane from the point where the alley enters it, and the alley now paved was then unpaved and sloped to the street from a point about 50 feet from the street-line. The kerb having been cut away to afford an entrance to the alley from Assumption street pavement, there seems to be a hollow in the pavement which catches the rain as it falls, and which is imperfectly drained, but this was not the cause of the so-called "rush of water." In the heavy rain there was water in the lane upon the surface from the natural drainage and from the roof of the shed and barns. This, no doubt, settled into the soft earth of the excavation unlawfully made by Holland in the lane, and was ample to accomplish the result. There was no great flood—just an ordinary heavy thunder-shower.

The action fails and must be dismissed.

The plaintiff appealed from the judgment of MIDDLETON, J.

May 7 and 8, 1919. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. H. Rodd, for the appellant, referred to *McGarvey v. Corporation of Strathroy* (1885), 10 A.R. 631; *Attorney-General v. Sheffield Gas Consumers Co.* (1853), 3 DeG. M. & G. 304; *Township of Bucke v. New Liskeard Light Heat and Power Co.* (1909), 1 O.W.N. 123; and to the provisions of the Municipal Act set out below:

John Sale, for the defendant corporation, respondent, was not called upon.

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May 8. At the conclusion of the argument the judgment of the Court was delivered by MEREDITH, C.J.O.:—Mr. Rodd has presented his case very fully and fairly, but we think the points taken in the course of the argument are fatal to him.

First, we think that there was no authority in the corporation to give a license to the appellant to interfere with the highway. The sections of the Municipal Act that have been referred to—secs. 406a., sub-sec. 3(a), and 483*—shew that the power of the corporation is limited to giving a right to put up what is known as a hoarding for the storage of materials. It is a limited right, and confers power to do no more than that.

Then I think, even if there had been power, still the difficulty in the way of the appellant is that no proper authority was given to him to do what he did. It is said that it was given by the inspector or some official of the corporation, but there is the significant fact that a permit was obtained from that officer, and it contains no such authority—it is simply an ordinary building permit, and gives only the right to occupy with a hoarding a portion of the street for the purpose of building operations.

There is no ground upon which it could be held that this corporation had—if it had the power to do so—sanctioned what was done by the appellant. It was by reason of the unlawful act of the appellant himself that what happened became injurious to him.

Appeal dismissed with costs.

*Section 406a. was added to the Municipal Act, R.S.O. 1914, ch. 192, by the Municipal Amendment Act, 1914, 4 Geo. V. ch. 33, sec. 13. It provides that “by-laws may be passed by the councils of cities” (see a further amendment by the Municipal Amendment Act, 1917, 7 Geo. V. ch. 42, sec. 16) for certain purposes, among which is:—

“3. (a) For permitting the use of a portion of any highway or boulevard by the owner or occupant of land adjoining such highway or boulevard during building operations upon such land for the storage of materials for such building or for the erection of hoardings.”

Section 483 of R.S.O. 1914, ch. 192, enacts that by-laws may be passed by the council of every municipality for certain purposes, among others:—

“1. For setting apart portions of the highways . . . for the purpose of boulevards

“3. For permitting the owners of lands to make, maintain and use areas under and openings to them in the highways and sidewalks . . .

(This is amended by the Municipal Amendment Act, 1917, 7 Geo. V. ch. 42, sec. 22, giving authority to permit the construction of a bridge across a highway.)

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[APPELLATE DIVISION.]

May 12.

RE GIBSON AND CITY OF HAMILTON.

Assessment and Taxes—Income Assessment—Income of Estate of Deceased Person in Hands of Trustees not Presently Payable to any one—Whether Assessable at all—Where Assessable—Place of Residence of Trustees—Place of Residence of Deceased—Assessment Act, secs. 2 (e), 5, 10, 11, 12, 13—"Person"—Interpretation Act, secs. 10, 29 (x).

An assessment of income of the estate of G., deceased, was made by a city corporation in 1918. By the terms of G.'s will, no one was presently entitled beneficially to the income assessed, nor until a future time could it be determined who should be entitled to take beneficially. The assessment was as of income in the hands of the trustees of the estate, and the sum in respect of which the assessment was made had in fact been received by them. Two of them lived in the city, and three elsewhere. G. himself never lived in the city; and only one of those who might ultimately take beneficially lived in the city:—

Held, that the assessment was illegal.

Per MULOCK, C.J.Ex., and RIDDELL, J.:—The income in respect of which any one is liable to taxation must be either (a) income derived by a person resident in Ontario, or (b) income received by an agent, trustee, etc., for a non-resident. Upon the facts of the case, the trustees were not assessable in respect of the income, and no beneficiary was assessable. No one was assessable, and the inference was that the Legislature did not intend that such a fund as the trustees had in their hands should be liable to taxation.

Per CLUTE, J.:—Having regard to sec. 29 (x) of the Interpretation Act, R.S.O. 1914, ch. 1, the word "person" in sec. 5 of the Assessment Act, R.S.O. 1914, ch. 195, included the trustees, and the portion of the revenue of the estate received by them was assessable in their hands as income. The intention of the Act was that all income—unless specifically exempted—should be liable to taxation; and the Act should receive a fair, large, and liberal construction: Interpretation Act, sec. 10.

The statute does not expressly declare in what municipality the income shall be assessed; but, as the trustees represented the estate of G., and, by secs. 11 and 12, every person in respect of income is to be assessed in the municipality in which he resides, by analogy and implication the income should be assessed by the corporation of the municipality where G. resided, and was not assessable by the city corporation which had made the assessment. Sections 2 (e), 5, 10, 11, 12 and 13 of the Assessment Act, considered.

AN appeal by the trustees of the estate of the Honourable William Gibson, deceased, from an order of the Senior Judge of the County Court of the County of Wentworth dismissing an appeal by the trustees from the decision of the Court of Revision for the City of Hamilton whereby an assessment of the estate of the deceased, by the Corporation of the City of Hamilton, in the year 1918, for taxable income, \$9,200, was affirmed.

The appeal was upon a case stated by the County Court Judge.

Two of the trustees and one of the beneficiaries resided in the city of Hamilton; the deceased himself did not in his lifetime reside in Hamilton.

The questions stated for the opinion of the Court were:—

(1) Is that portion of the revenue of the estate of the Honourable William Gibson received by the trustees in Hamilton assessable anywhere, under the provisions of the Assessment Act as to taxation of income?

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(2) If so, is it assessable in Hamilton?

December 11, 1918. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

John Jennings and *George C. Thomson*, for the appellants, argued that the general principle of the Assessment Act, R.S.O. 1914, ch. 195, as respects the taxation of income, is that revenue in the hands of trustees is not assessable; it is assessable only when it reaches the hands of the beneficiaries; also that the Act does not authorise the assessment of the income in question, as by the terms of the will this income is to be added to and form part of the testator's "general trust estate," which is not to be divided until 1920. Income should be assessed only when it comes to the hand of the recipient. The County Court Judge had approached the construction of the statute so as to uphold the assessment. The reverse should be the attitude of the Court. The principle is, that municipal corporations can levy no taxes unless the power be plainly conferred: *Dillon on Municipal Corporations*, 5th ed., vol. 4, sec. 1377, pp. 2398, 2399; *Maxwell on the Interpretation of Statutes*, 5th ed., pp. 463, 464; *Partington v. Attorney-General* (1869), L.R. 4 H.L. 100, at p. 122. The income of the estate, if assessable at all, was not assessable by the Corporation of the City of Hamilton. Income should be assessed only in the place where it comes to the hand of the recipient. A group of trustees can have no place of residence. In this case two of the trustees reside in Toronto, one in Winnipeg, and two in Hamilton. Only one of the five beneficiaries lives in Hamilton. The testator never resided in Hamilton.

F. R. Waddell, K.C., for the Corporation of the City of Hamilton, respondents, contended that the assessment had been rightly made. Under sec. 13 of the Act, the trustees are assessable. The testator could not place his estate in a better position than himself. Section 5 made all income assessable. It did not matter where the money came from; it was where the income was paid that counted. The two questions should be answered in the affirmative.

Jennings, in reply.

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May 12, 1919. MULOCK, C.J. Ex.:—This is an appeal from the judgment of His Honour the Judge of the County Court of the County of Wentworth, dismissing an appeal by the trustees of the estate from the decision of the Court of Revision of the City of Hamilton, affirming an assessment of the estate of the deceased in respect of the sum of \$9,200 as taxable income in the year 1918.

The will of the testator contains the following clauses:—

“7. . . . And I direct that all the income from time to time not required for the purposes of maintenance of my said children shall be added to and form part of my estate herein called the ‘general trust estate.’

“8. I hereby declare and direct that my trustees shall hold the said general trust estate and all other trust premises (if any) . . . and after having carried out the terms of any declaration or declarations of trust which I may have made upon trust on my youngest living child attaining twenty-five years to divide my general trust estate as it may then exist in equal shares or portions among my children then living and the children then living of any deceased child of mine such grandchildren taking (equally as between them) if more than one the share their parent would have taken if then living and the share of any such grandchild under twenty-one years of age shall be paid to his or her guardian duly appointed or be received and held by the Mercantile Trust Company of Canada Limited as such guardian or as trustee.”

It is admitted that no portion of the \$9,200 in question is required for the maintenance and education of any child of the testator.

The provisions of the Assessment Act, R.S.O. 1914, ch. 195, applicable to the question before us, are as follows:—

Section 5: “All . . . income derived either within or out of Ontario by any person resident therein or received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation, subject to the following exemptions.”

(Then follows a list of exemptions, none of which apply to the income in question.)

Section 11: “Subject to the exemptions provided for in sections 5 and 10:—

“(a) Every person not liable to business assessment under section 10 shall be assessed in respect of income;

“(b) Every person although liable to business assessment under section 10 shall also be assessed in respect of any income not derived from the business in respect of which he is assessable under that section.”

Section 12. “Subject to sub-section 6 of section 40 every person assessable in respect of income under section 11 shall be so assessed in the municipality in which he resides either at his place of residence or at his office or place of business.”

Section 13. “Every agent, trustee or person who collects or receives, or is in any way in possession or control of income for or on behalf of a person who is resident out of Ontario, shall be assessed in respect of such income.”

According to sec. 5, “income,” to be liable to taxation, must be income “derived” by a person resident in Ontario or “received in Ontario by or on behalf of a person resident out of Ontario.” That is, the income in respect of which any one is liable to taxation must be either (a) income derived by such person being resident in Ontario, or (b) income received by an agent, trustee, etc., for a non-resident.

In the former case the person assessable is the beneficiary: in the latter, it is his representative. The beneficiary “derives” the income, but the representative merely receives it.

Income to be assessable must, I think, fall within one or other of these two classes.

By the terms of the testator’s will, no one at present is entitled beneficially to the income in question, nor until a future period can it be determined who shall be entitled to take beneficially.

There can be no taxation of income without previous assessment of some person in respect of such income. A person liable to assessment becomes personally liable to pay the tax. At the present time no one is liable to assessment in respect of the income in question or entitled to it beneficially.

Counsel for the respondents argued that under sec. 13 the trustees were assessable. To bring the case within that section, it must appear that the trustees are collecting or receiving the income for or on behalf of a person, and also that such person is resident out of Ontario. It may be that the person who ultimately becomes entitled to the income in question is yet unborn. Such a person does not come within the class of persons mentioned in

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sec. 13, namely, persons resident out of Ontario. This implies a person living at the present time and residing out of the Province.

Further, the section renders the trustees assessable only when the *cestui que trust* resides out of the Province. Such is not the present case. I am, therefore, of the opinion that, in view of the facts of this case, the trustees are not assessable in respect of the income in question. Thus, there is no one at the present time who is assessable in respect of the income in question, and the inference is that under such circumstances the Legislature did not intend that the fund should be liable to taxation.

I therefore, with respect, think the appeal should be allowed, with costs, if asked.

RIDDELL, J., agreed with MULOCK, C.J. Ex.

CLUTE, J.:—The following case is stated for the opinion of a Divisional Court, by way of appeal by the trustees of the estate of the late William Gibson from the judgment of His Honour Judge Snider, Judge of the County Court of the County of Wentworth, dated the 12th November, 1918, whereby an appeal by the said trustees from the decision of the Court of Revision for the Municipality of the City of Hamilton, dated the 16th October, 1918, was dismissed.

This appeal is made pursuant to sec. 81 of the Assessment Act, as enacted by the Assessment Amendment Act, 1916, 6 Geo. V. ch. 41, sec. 6.

The said estate was assessed in 1918 by the Municipality of the City of Hamilton for income on a sum of \$9,200. The said trustees dispute the right of the said municipality so to assess the said estate, on the following grounds:—

“(1) The general principle of the Assessment Act, R.S.O. 1914, ch. 195, as respects the taxation of income, is, that revenue in the hands of agents or trustees (except agents or trustees for non-residents of this Province) is not assessable in the hands of such trustees nor until it reaches the hands of the persons (being residents of this Province) who are entitled to use the same for their own purposes.

“(2) That under the Assessment Act now in force, R.S.O. 1914, ch. 195, there is no authority for the assessment of income of this

estate in the hands of the trustees, as by the terms of the will the same shall be added to and form part of the testator's 'general trust estate,' which is not divisible until 1920.

"(3) That the revenue or income of the estate is not assessable by the Municipality of the City of Hamilton."

The following are admissions of fact:—

"(a) That the testator did not reside in Hamilton.

"(b) That two of the trustees reside in Toronto, one in Winnipeg, and two in Hamilton.

"(c) That only one beneficiary resides in Hamilton.

"(d) That none of the income in question is required for the maintenance and education of any child of the testator.

"(e) That the said general trust estate is not divisible until 1920.

"(f) That there is sufficient income of the estate received by the trustees in Hamilton to justify the assessment if assessable in Hamilton."

The questions for the opinion of the Court are: (1) Is that portion of the revenue of the estate of the Honourable William Gibson received by the trustees in Hamilton assessable anywhere, under the provisions of the Assessment Act as to taxation of income? (2) If so, is it assessable in Hamilton?

Clause 7 of the will directs that "all the income from time to time not required for the purposes of maintenance of my said children shall be added to and form part of my estate herein called the 'general trust estate.'

"8. I hereby declare and direct that my trustees shall hold the said general trust estate and all other trust premises (if any) . . . and after having carried out the terms of any declaration or declarations of trust which I may have made upon trust on my youngest living child attaining twenty-five years to divide my general trust estate as it may then exist in equal shares or portions among my children then living and the children then living of any deceased child of mine such grandchildren taking (equally as between them) if more than one the share their parent would have taken if then living and the share of any such grandchild under twenty-one years of age shall be paid to his or her guardian duly appointed or be received and held by the Mercantile Trust Company of Canada Limited as such guardian or as trustee."

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Section 2(e) of the Assessment Act defines "income," and adds: "and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source."

Section 5 provides that " . . . all income derived either within or out of Ontario by any person resident therein, or received in Ontario by or on behalf of any person out of same, shall be liable to taxation," subject to certain exemptions which do not affect this case.

By the Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (x), "person" shall include any body corporate or politic, and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law.

Section 5 of the Assessment Act makes all income derived within Ontario by any person or resident therein liable to taxation.

The first question is: Do the trustees of this estate fall within the definition of "person," within the meaning of sec. 5?

It does not appear from the case stated who the trustees are, or whether they are also the executors of the will.

In my opinion, the definition of "person" in the Interpretation Act, above referred to, is broad enough to include the trustees in this case: they fall within the definition of the term "person" in the Interpretation Act.

I think it plain that the intention of the Act is that all income—unless excepted—is liable to taxation. The Act should "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act . . . according to the true intent, meaning and spirit thereof:" Interpretation Act, sec. 10.

If the construction contended for by the trustees is the true one, the true intent and meaning of the Act might be avoided and its application precluded in every case of this kind.

The answer to the first question should be "Yes."

Under the heading "Taxation on Income directly," secs. 11, 12, and 13 contain certain provisions. Section 11 (1) (a) provides that "every person not liable to business assessment under section 10 shall be assessed in respect of income."

Section 10 refers to business assessment.

Section 12 (1) provides that, subject to sub-sec. 6 of sec. 40 (which refers to mines and does not affect this case), every person assessable in respect of income under sec. 11 shall be so assessed in the municipality in which he resides at his place of residence or at his office or place of business.

I think the trustees in this case are included in the above definition of "person," and that the portion of the revenue of the estate received by the said trustees is assessable in their hands as income.

The statute does not expressly declare in what municipality such income shall be assessed; but, inasmuch as, under secs. 11 and 12, every person in respect of income shall be assessed in the municipality in which he resides, either at his place of residence or at his office or place of business, and as the trustees represent the estate of the deceased person, by analogy and implication from the wording of the statute the said income should be assessed by the municipality where the testator resided and carried on his business at the time of his death, and is not assessable in Hamilton.

I think the appeal should be allowed with costs, if asked.

SUTHERLAND, J., agreed in the result.

Appeal allowed.

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May 14.

[IN CHAMBERS.]

REX v. DUCKER.

Criminal Law—Offence of (by Sexual Immorality) Rendering Home Unfit Place for Children—Jurisdiction of Judge of Juvenile Court—Juvenile Delinquents Act, 1908, sec. 30 (Dom.)—Criminal Code, sec. 220A. (8 & 9 Geo. V. ch. 16, sec. 1)—Children's Protection Act of Ontario, sec. 18 (d).

Reading sec. 30 of the Juvenile Delinquents Act, 1908, 7 & 8 Edw. VII. ch. 40 (Dom.), with sec. 220A. of the Criminal Code, as enacted, since the decision in *Rex v. Davis* (1917), 40 O.L.R. 352, by the amending Act (1918), 8 & 9 Geo. V. ch. 16, sec. 1, the Judge of a Juvenile Court has jurisdiction to try and convict a person accused of the offence of, by indulgence in sexual immorality, causing a child to be in danger of being or becoming immoral, dissolute or criminal, or the morals of the child to be injuriously affected, and by such conduct rendering the home of the child an unfit place for such child to be in.

Quare, as to the extent of the powers of the Ontario Legislature with respect to the enactment of sec. 18 (d) of the Children's Protection Act of Ontario, R.S.O. 1914, ch. 231.

CASE stated by the Commissioner or Judge of the Juvenile Court, Toronto.

April 1. The case was heard by SUTHERLAND, J., in Chambers.
J. E. Lawson, for the defendant.
W. L. Scott, for the Crown.

May 14. SUTHERLAND, J.:—The question to be determined is as to the jurisdiction of the Judge of the Juvenile Court at Toronto to try and convict the accused of a certain offence.

Louis Hunter and Florence Hunter, a married couple, had separated, he going to Western Canada, and she continuing to live in Toronto. Florence Hunter is the mother of the children mentioned in the stated case.

The facts are set out in the case stated for the opinion of the Court, by the Judge of the Juvenile Court, as follows:—

“The defendant, Ernest Ducker, *alias* Smith, was charged on the 30th day of November, 1918, that he did on the 4th day of November, in the year of our Lord 1918, and previously, at the city of Toronto, in the county of York, at 87 Peter street, in the home of Edward Hunter or Smith, Victor Hunter or Smith, Amy Hunter or Smith, Marie Hunter or Smith, and Baby Hunter or Smith (illegitimate), all children under the age of sixteen years, by indulgence in sexual immorality, cause said

children to be in danger of being or becoming immoral, dissolute or criminal, or the morals of said children to be injuriously affected, and by such conduct has rendered the home of said children an unfit place for such children to be in.

"As Judge of the Juvenile Court I did on the 26th day of February, A.D. 1919, convict the defendant of the offence charged in the information and complaint."

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The opinion of the Court is asked on the following question:—

"Has the Judge of the Juvenile Court jurisdiction to try and convict the defendant of the offence above set out?"

In the Juvenile Delinquents Act, 1908, 7 & 8 Edw. VII. ch. 40 (Dom.), by sec. 2, para. (g), "the judge" means the judge of a Juvenile Court seised of the case, or the justice, specially authorised by Dominion or provincial authority to deal with juvenile delinquents, seised of the case; and secs. 5, 29, and 30 of the Act are as follows:—

Section 5: "Except as hereinafter provided, prosecutions and trials under this Act shall be summary and shall, *mutatis mutandis*, be governed by the provisions of Part XV. of the Criminal Code, in so far as such provisions are applicable, whether or not the act constituting the offence charged would be in the case of an adult triable summarily; provided that whenever in such provisions the expression 'justice' occurs, it shall be taken in the application of such provisions to proceedings under this Act to mean 'judge of the Juvenile Court, or justice specially authorised by Dominion or provincial authority to deal with juvenile delinquents.'"

Section 29: "Any person who knowingly or wilfully encourages, aids, causes, abets or connives at the commission by a child of a delinquency, or who knowingly or wilfully does any act producing, promoting or contributing to a child's being or becoming a juvenile delinquent, whether or not such person is the parent or guardian of the child, or who, being the parent or guardian of the child and being able to do so, wilfully neglects to do that which would directly tend to prevent a child's being or becoming a juvenile delinquent, or to remove the conditions which render a child a juvenile delinquent, shall be liable on summary conviction before a Juvenile Court or a justice, to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding one year, or to both fine and imprisonment.

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"2. The court or justice may impose conditions upon any person found guilty under this section, and suspend sentence subject to such conditions; and on proof at any time that such conditions have been violated may pass sentence on such person."

Section 30: "Prosecutions against adults for offences against any provisions of the Criminal Code in respect of a child may be brought in the Juvenile Court without the necessity of a preliminary hearing before a justice, and may be summarily disposed of where the offence is triable summarily, or otherwise dealt with as in the case of a preliminary hearing before a justice.

"2. In addition to those expressly mentioned in this Act, the Juvenile Court judge has all the powers and duties, with respect to offenders, under or apparently under the age of sixteen years, vested in, or imposed on a judge, stipendiary magistrate, justice or justices, by or under the Prisons and Reformatories Act, chapter 148 of the Revised Statutes, 1906, or any amendment thereto: Provided that the discretion of the Juvenile Court judge as to the term for which a juvenile offender may be committed is not affected by this sub-section."

Section 761 of the Criminal Code, one of the provisions included in Part XV. thereof, provides for stating a case where a conviction is sought to be questioned.

The Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, sec. 18, provides that "any person who . . . (d) is guilty of an act or omission which contributes to a child being or becoming a neglected child, shall incur a penalty," etc.

Some question has been raised as to the extent of the powers of the Legislature with respect to this enactment.

In *Rex v. Davis* (1917), 40 O.L.R. 352, it was held that there was no right to punish an accused person unless it was shewn that the act or omission charged against him contributed to a child being or becoming a neglected child or that there was an actual injury to the child.

In the year 1918 an Act to amend the Criminal Code, 8 & 9 Geo. V. ch. 16, was passed, sec. 1 of which enacted as follows:—

"1. The Criminal Code is amended by inserting the following section immediately after section two hundred and twenty:—

"220A. (1) Any person who, in the home of a child, by indulgence in sexual immorality, in habitual drunkenness or in

any other form of vice, causes such child to be in danger of being or becoming immoral, dissolute or criminal, or the morals of such child to be injuriously affected, or renders the home of such child an unfit place for such child to be in, shall be liable, on summary conviction, to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding one year or to both fine and imprisonment."

It was suggested upon argument by counsel for the Crown that perhaps there was no right of appeal at all from the decision of the Judge of the Juvenile Court. It seems, however, clear that such right exists. It was conceded by counsel for the Crown that the prosecution in question was brought under the above mentioned sec. 30 of the Juvenile Delinquents Act, 1908, 7 & 8 Edw. VII. ch. 40, and he went to the length of arguing that the language of that section, namely, "Prosecutions against adults for offences against any provisions of the Criminal Code in respect of a child," etc., was wide enough to cover even the most serious offences mentioned in the Code.

It is clear from the evidence in this case that the mother of the children in question was indulging in sexual immorality with the accused in the home where they were, under circumstances in which the Judge of the Juvenile Court might well come to the conclusion that the morals of the children might be injuriously affected and the home rendered an unfit place for them to reside in. Reading sec. 30 of the Juvenile Delinquents Act, 1908, with the amendments to the Criminal Code in 1918 referred to, it seems to me to be plain that the Judge of the Juvenile Court had jurisdiction to try and convict the accused of the particular offence in question.

The question asked in the stated case is, therefore, to be answered in the affirmative.

Sutherland, J.

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[APPELLATE DIVISION.]

May 16.

TORONTO HYDRO-ELECTRIC COMMISSION V. TORONTO R.W. CO.

Negligence—Street Railway Company—Leaving Electric Street-car upon Tracks in Highway of City Unattended and in Condition to be Put in Motion—Trespasser Setting Car in Motion—Injury to Property—Liability—Question whether Company had Reason to Anticipate Act of Trespasser—Proximate Cause of Injury—Nuisance.

A person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another, is answerable for the resulting injury, even though but for the intervening act of a third party the injury would not have occurred, if such act is one which in the circumstances he should reasonably be called upon to anticipate.

Review of the authorities.

An electric street-car of the defendants was left standing upon the defendants' tracks in a highway, about 12.30 a.m., unattended, with its doors unlocked, connected with the electric power, the controller-key in an accessible place, and the controller-handle in place. An unknown person, shortly after 4 a.m., set the car in motion, drove it through the streets, and finally abandoned it, after which it ran on, became derailed, and destroyed a pole of the plaintiffs planted in the highway:—

Held (MEREDITH, C.J.C.P., dissenting), that the act of the trespasser was "a fresh independent cause," which, in the circumstances, the defendants had no reason to anticipate: the plaintiffs failed in their action to recover damages for the loss they had sustained because the negligence of the defendants, found by the jury, was not the proximate cause of the damage—the sole proximate cause was the act of the trespasser.

Per MEREDITH, C.J.C.P.:—The defendant's negligence need not be the proximate cause of an injury to give a right of action: it is enough if it be a proximate or effective cause. Without the defendants' negligences the injury could not have been caused—the "third person" was powerless; and their negligences were the proximate and effective cause of the third person's wrong—they tempted and induced the impulse to do the wrong, as well as supplied, all ready at hand, the means to give effect to it. The thing which did the injury was an exceedingly dangerous thing, owned by the defendants, and wrongfully left by them in a place and state which made it most likely to do the greatest wrong and mischief. The case was not one of negligence merely, but one of nuisance—a public nuisance fraught with great danger and accompanied by gross neglect of common precautions.

AN appeal by the defendants from the judgment of WINCHESTER, Sen. Co. C.J., in favour of the plaintiffs in an action in the County Court of the County of York, brought to recover damages for the destruction of a pole of the plaintiffs, planted in a highway in the city of Toronto, by a street-car of the defendants, which ran off the track and into the pole.

The car was left by the defendants servants' standing upon a track, and was set in motion by some person unknown, who drove it along the tracks in the city for a considerable distance, and finally abandoned it; the car then, being left without guidance, became derailed and did the damage complained of.

April 16. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

Gideon Grant, for the appellants, argued that there was no negligence in leaving the car in the street. It was not a dangerous thing, for what happened was not to be anticipated. The rule is that when the proximate cause is the malicious act of a third person, intervening between the negligence of the defendant and the injury to the plaintiff, the defendant is not liable unless it is shewn that he ought to have foreseen and provided against it. This rule runs through all the cases: *Geall v. Dominion Creosoting Co. Limited*, *Salter v. Dominion Creosoting Co. Limited* (1917), 55 Can. S.C.R. 587, 39 D.L.R. 242; *McDowall v. Great Western R.W. Co.*, [1903] 2 K.B. 331; *Dominion Natural Gas Co. Limited v. Collins*, [1909] A.C. 640; *Ruoff v. Long & Co.*, [1916] 1 K.B. 148; *Latham v. R. Johnson & Nephew Limited*, [1913] 1 K.B. 398; *Jenkins v. Great Western Railway*, [1912] 1 K.B. 525.

C. M. Colquhoun, for the plaintiffs, respondents, contended that, as there was evidence to support the learned County Court Judge's finding that the defendants were negligent, the finding should not be disturbed. The defendants were negligent in leaving a lighted street-car with open doors and accessible controller-key and handle on a city street all night. They should have apprehended that some one mischievously inclined might start it in motion. The cases cited for the appellants were distinguishable, because here the dangerous thing was left on the public street. The case came within the principle of *Clark v. Chambers* (1878), 3 Q.B.D. 327, and *Illidge v. Goodwin* (1831), 5 C. & P. 190.

Grant, in reply.

May 16. MIDDLETON, J.:—A car of the defendant company was left standing upon Frederick street at 12.30 a.m. on the 12th July, 1918. The current was off the motors, as the circuit-breaker was open and the hand-brakes were set. The car remained on the street until shortly after 4 a.m., when some one boarded the car and set it in motion. The car was taken west along Front street, north to Queen street, and then east along Queen street, and, after passing over the Don bridge, was finally derailed at Broadview avenue, when it ran into and broke one of the plaintiffs' poles.

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Whoever started the car in motion abandoned it before this point had been reached.

This action having been brought to recover the damages sustained, the learned Judge found for the plaintiffs, holding that the defendants were guilty of negligence in allowing the car to remain on the street unattended and unsecured and in leaving the controller-key in the car so that an evil-disposed person might start the car.

I think this judgment cannot be sustained.

When the proximate cause is the malicious act of a third person which intervenes between the negligence of the defendant and the injury to the plaintiff, the defendant is not liable unless it is shewn that he ought to have foreseen and provided against it.

The difference of opinion in *Geall v. Dominion Creosoting Co. Limited*, 55 Can. S.C.R. 587, 39 D.L.R. 242, arose from the fact that, in the opinion of the majority, the defendants ought to have anticipated that boys might release the cars standing at the head of the incline. The minority were of opinion that this was something which ought not to have been anticipated.

In *Ruoff v. Long & Co.*, [1916] 1 K.B. 148, the point is clearly stated by Mr. Justice Lush (p. 157, *ad fin.*): "The chain of causality may be complete although a link in the chain is the intervening act of a third person. But the act which causes the mischief must be one which he would properly anticipate."

Here the action of the trespasser who entered the car and set it in motion was "a fresh independent cause," which, under the circumstances, the defendants had no reason to contemplate.

Most of the authorities are collected in the case in the Supreme Court of Canada. I refer particularly to *Rickards v. Lothian*, [1913] A.C. 263, and *Hudson v. Napanee River Improvement Co.* (1914), 31 O.L.R. 47.

Shortly, the plaintiffs fail because the negligence found is not the proximate cause of the damage. The sole proximate cause was the action of the trespasser.

The appeal should be allowed and the action should be dismissed, both with costs.

RIDDELL, J., agreed with MIDDLETON, J.

BRITTON, J.:—For my decision in this case I rely upon the ordinary rule as to definition of negligence.

Negligence is said to be the doing of something that a reasonable man acquainted with all the circumstances of the case would not do, or the leaving undone something that a reasonable man would not leave undone, contrary to obligation or rule requiring it to be done under the circumstances.

The person charged here is presumably a reasonable man; he was acquainted with all the circumstances in the case, and he did what is complained of.

It is purely a question of fact, and I agree with the opinion of those who decide that the act of leaving the car as it was left, and doing anything that can be called negligent, was in fact not negligent under the circumstances.

LATCHFORD, J.:—The rule applicable to this case is that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another, is answerable for the resulting injury, even though but for the intervening act of a third party the injury would not have occurred, *if such act is one which in the circumstances he should reasonably be called upon to anticipate*: Lush, J., in *Ruoff v. Long & Co.*, [1916] 1 K.B. 148, at p. 157.

The defendants were undoubtedly negligent in leaving their car upon the public highway, in the circumstances disclosed in the evidence. But for such negligence the accident could not have happened. Another element must, however, be added before liability can result. In all the cases following *McDowall v. Great Western R.W. Co.*, [1903] 2 K.B. 331, where the intervention of a third party was the direct cause of the accident, the test applied is, whether the party guilty of the primary negligence had cast upon him the duty of anticipating such intervention. Was there a likelihood of injury happening through the acts of others? If so, the original wrongdoers are liable: *Geall v. Dominion Creosoting Co. Limited*, 55 Can. S.C.R. 587, 39 D.L.R. 242.

No finding upon this material point was made by the learned trial Judge; and, on perusing the evidence, I find nothing that, in my opinion, would justify such a finding.

To paraphrase what was said by Lord Macnaghten in *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229, at

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p. 334, a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, would have no reason to anticipate such an act as that which caused the damage sustained by the plaintiffs.

I therefore think the appeal should be allowed, and with costs.

MEREDITH, C.J.C.P. (dissenting):—Although the amount involved in this litigation is small in the eyes of the parties to this action, the substantial question involved in it is one of much moment, not only to them, but to every one. That which happened in this case, providentially, did not cause the death of any being, nor, except perhaps to the defendant wrongdoers, cause any considerable injury to property: but one may very well think that it could not happen again without loss of human life, the life of some, perhaps a number, of His Majesty's liege subjects in the lawful exercise of their rights on his highways; and without also great injury to property.

If such things could happen, without liability, civil or criminal, on the part of the owners of a "runaway" car, running upon their tracks, and running "wild" through their gross negligence, merely because some one, unknown, had wrongly given effect to their gross negligence by the simple means which put the car in motion, the law would be lamentably weak and ineffectual. That, in such a case, the gross wrongdoing-owners should be justified in law, and the injured, public and private, without any remedy, that the law should uphold them in saying to the injured, seek your redress from the unknown—and possibly worthless—person who joined with us in enabling the wild car to kill and injure beings and property, seems to me to be inconceivable.

The facts are few, and there seems to have been little dispute as to them at the trial, though I am bound to say that it would have been better if they had been elicited in the usual way, or, if admitted, admitted in writing signed by counsel or solicitors.

The first link in the chain of negligences was that of the defendants: they left upon one of the main streets of Toronto—Front street—or in another street close to it, one of their passenger street railway cars, from midnight until its wild run began about four hours afterwards. That was not only an act of gross negligence,

but an act which created a public nuisance in the public way: a wrong not lessened by the fact that this was not the first occasion of such wrongdoing; that, indeed, it had been a practice of the defendants to "stable" their cars upon the street until it was convenient for, or suited, them to bring them upon their own property. The story of the "night shed foreman" of the defendants, given in the witness-box at the trial, was that: "It was ordered to be hauled in the next day, but for what purpose I do not know: it may be that it was wanted for a pattern for the 'pay-as-you-enter' cars." So that this car's stabling on the highway was to last until the next day.

All this is not without significance; it gave to any one whose rights upon the highway were violated by the car being there, a right to abate the nuisance, a right to enter the car and put it in motion in effecting that object; and it would have been an act commendable, rather than otherwise, to have abated the nuisance by running the car into the defendants' property. The case is obviously different from that which it would have been if the car had been upon the defendants' property, and any one entering a mere trespasser. We must therefore start from the actual starting point, not from a wrongly imagined one, of an innocent and injured owner of property.

Then the car was left with its doors open, though the locking of them was a precaution that none but the careless and indifferent to consequences could have neglected; being a "pay-as-you-enter" car, there must have been a very effectual way of closing the car against all intruders; and if the "night shed foreman" had not, as he should have had, a "pass-key" suitable for all doors, the key of a door of this car should have been given to him when the car was left under his control.

To leave the car open and wholly unguarded upon a highway all night, was something like making an "enter-as-you-please-for-any-purpose-you-like" car of it also, and one must have a very unimaginative mind if he did not think that in such a place it might be made use of by some one with evil or harmless purpose.

Then the car was left connected with the electric power, though it would have been a very easy and proper thing to have disconnected it, leaving it powerless. The excuse made by the night shed foreman was that, being upon the highway, the car

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had to be lighted so that the obstruction it created might be made more noticeable. An excuse which fails, for one thing, because it was daylight when the car was set in motion, within half an hour of sunrise in mid-summer; and light enough for a "suspicious character," "hanging around," to have been seen by the night shed foreman or one of his fellow-employees and "Mr. Berry;" and yet not a step was taken to protect the car: and an excuse which fails, for another thing, because the proper protection was not lights inside the car, but was danger red lights outside, at both ends.

Then the controller-key of the car, though it had been turned, was left hanging to a chain which kept it within six inches of the place of turning on again: something after the fashion of the proverbial latch-string hanging outside the door of hospitality or "help-yourself."

Then, for the fifth act of gross negligence—neglect of the defendants' own interests as well as of those of every one else—the controller-handle was left in place: it must have been, or the unknown person could not have put the car in motion. A handle so easily removed, and so proper to be removed whenever the driver is even momentarily out of sight of his car, that no driver of ordinary care so leaves his car, at any time, when it is in his charge, without removing it and taking it with him.

And yet all has not been said that can be said against the defendants. The car, wholly uncontrolled by any one, and without any one in it, was running "amuck," about 4 o'clock in the morning, at the rate, it is said, of 60 miles an hour, on the defendants' railway tracks, when, at a turn of the road, it "jumped" from them and ran into a pole of the plaintiffs' electric light and power lines, doing the injury for which damages were sought, and awarded, in this action.

So that the plaintiffs start with a very clear *primâ facie* case of liability on the part of the defendants. It is a plain case of that which is commonly called *res ipsa loquitur*. Street-cars do not run at high rates of speed, hardly perhaps at 6, not to speak of 60, miles an hour, when approaching a turn of the road from one street into another; "jumping" from the track would be inevitable if they did.

Then, being *primâ facie* liable, how do the defendants justify or excuse themselves? First, by shewing themselves guilty of

the grossest negligences in the several ways before mentioned; and then saying that all that would not have caused the injury complained of if some one else, unknown, had not done something also; that is to say, that, although they laid the train, and left it open to any one to apply the match, they are not answerable for the consequence of any explosion not "set off" by themselves. That they can place a great danger in a thoroughfare, and be blameless because some weak, or bad, or frolicsome, person "touched it off." That they can so induce mischievous, bad, or frolicsome impulses—impulses perhaps momentary only—and be saved harmless from the wrongs their temptations caused, because their own hands did not do everything.

If the defendants had left a loaded fowling-piece in the highway unguarded, could any one reasonably say that the act of a stranger in setting it off should relieve them from liability? That which these defendants did was a much more dangerous thing; and something more easily "set off." There are few men or boys, or women or girls, who have not seen the electric cars in operation, and who could not have released the hand-brake—no other brake was applied—have put the key in place, have drawn the hood switch, and have set the car in motion, more in number I am sure than those who could have discharged the gun with its brakes, safety device, applied to the triggers, and yet, in either case, there should be no difficulty, in any one of common intelligence—or perhaps without it—setting off either gun or car, though never shewn how.

The case may be one of fact, but one which seems to me so clear against the defendants that I do not feel the need of any support for my conclusion; yet I am glad to know that it is entirely in accord with that of the learned Judge who tried the case and based his judgment upon like reasons; that Judge being the Senior Judge of the county in which these things happened: a Judge of great experience in the locality, so much so that in regard to ways and manners, good and ill-doing characters and impulses, and what is likely and unlikely to happen in such circumstances as those of this case, if a Judge's experience teaches, he should have more and better knowledge than any of us, regarding the questions of fact involved in this case.

Nor can I find a single case in which anything was decided, or even said, inconsistent with the views given effect to by him.

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Indeed I undertake to shew that in none of the cases from which the defendants seek support would the plaintiff have failed were the facts as they are in this case; and the importance of the subject quite justifies a short reference to all of them. —

In the case of *McDowall v. Great Western R. W. Co.*, [1903] 2 K.B. 331, the brake-van, which was let loose by mischievous boys, was on the property of its owners, and "it was locked up, it was braked, and it was coupled by a screw coupling to the train;" so that these boys "had to break into the van, or get into it with keys, which it is not suggested they did; and when they got there they had a great deal to do before this van could be loosed and allowed to run down the incline" (p. 335); there was no evidence of any van or vehicle having before been set loose; and two at least of the appellate Judges considered that there was no negligence on the part of the defendants in the manner in which the car was left on the defendants' own property. Now let it be supposed that the van was left through the night upon a public highway in a great city, with the van-doors open, and only a few simple movements needed to set it going, and then say whether it is possible that the verdict in the plaintiff's favour in that case could have been disturbed. At the trial of the case by a Judge as capable as the late Lord Justice Kennedy, after consideration, judgment was pronounced in the plaintiff's favour. That fact is met by Mr. Grant by calling attention to the circumstances, alleged by him, that in this case the car was facing an upward incline, though Mr Colquhoun was very sure it was not, whilst the van in the other case was facing a downward one, but the reply to that is very obvious: whether up hill or down dale, this car was connected with the electric power, and when the car's restraints were removed would run either up or down grade with great ease, without even the push the van needed to start it. It was simply a matter, and a very simple matter too, of "cutting loose" by releasing the hand-brake and turning the driving power on.

In that of *Ruoff v. Long & Co.*, [1916] 1 K.B. 148, a judgment of a Divisional Court, not of the Court of Appeal, it was held that there was no negligence on the part of the defendants; that they were within their lawful rights, the lorry by which the injury complained of was done having been only "left momentarily unattended while the three men were delivering the beer;" and

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each of the two Judges, who composed the Court, carefully abstained from ruling that the defendants would have escaped liability—if there had been negligence on their part—only because the injury complained of was caused by two soldiers, during that momentary absence, having climbed into the lorry, and after some difficulty succeeded in setting in motion—the wrong way—the steam power lorry, a somewhat complicated and difficult feat. If they could not find for the defendants on that ground in such a case as that, how could they in such a case as this, of the grossest neglect extending over four hours of the night, and including leaving the car open, and all ready to be started, when a moment's time should have been enough to have made it “safe.”

In that of *Rickards v. Lothian*, [1913] A.C. 263, it is said to have been held that “where the proximate cause is the malicious act of a third person against which precautions would have been inoperative, the defendant is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it;” and it was said, of the wrong that caused the injury, “against such acts no precaution can prevail.” How can such a case help the defendants in this case, in which they laid the whole train ready for the “third person,” whether his act was malicious or revengeful—and the defendants have enemies—or, much more likely, only mischievous or merely exuberant, and left it on a Toronto highway with such invitation as open doors afforded: and a case in which the simple precaution of locking the doors, or one of several like things, would have prevailed against the third party's wrong?

In *Hudson v. Napanee River Improvement Co.*, 31 O.L.R. 47, the water was on the defendants' own property, and no negligence of the defendants was proved. The jury thought the defendants should have provided watchmen to prevent any wrongful destruction of their dam. One of the Appellate Division Judges thought that such a precaution would have been useless: but said: “If any means could be reasonably devised to avoid or minimise the evil results of such attempt”—to blow up the dam—“it should be adopted.” To make that case and this case at all alike, we must imagine the dam a nuisance upon a highway; and with ready and easy means in the plaintiffs' power—a locked room merely for one of several things—to prevent the injury; but the

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room left unlocked, and a simple means of letting the water go all ready for the hands of any one who cared to let them go, or in whom an impulse to do so might be raised on seeing all things so ready.

In *Dominion Natural Gas Co. Limited v. Collins*, [1909] A.C. 640, Lord Dunedin, speaking for the Judicial Committee of the Privy Council, said (pp. 646, 647):—

“The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendants had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon v. Bell* (1816), 5 M. & S. 198, *Thomas v. Winchester* (1852), 6 N.Y. 397, and *Parry v. Smith* (1879), 4 C.P.D. 325, are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail.”

Although very many years ago it was said that the whole law could be taught while a man could stand upon one leg, it seems difficult in these days to make any part of it plain in a few words. “The conscious act of another volition” may to a Scotch lawyer be ample because of something pertaining to the laws of Scotland not generally known, but to me the expression would not be helpful: however, for present purposes, the context makes the very learned Judge’s meaning very plain. “The conscious act of another volition” is something against which “no precaution can really avail.” That puts the act of the unknown person under which the defendants seek shelter very far away from “the conscious act of another volition,” for there were several simple, obvious precautions, any one of which must have prevailed, precautions that would cost nothing, and could have been taken in a few moments, without any labour: for instances: (1) run the car into the car-sheds, instead of leaving it on the public way: it will be observed that the night shed foreman is very careful to avoid saying that there was not room in the shed for it, and does say that it was ordered to be hauled in next day, for what reason he

does not know; (2) lock the doors of the car; (3) disconnect the electric current by separating the pole from the wire; (4) remove the controller-key; (5) remove the handles of the controller; and (6) prevent "suspicious characters" from "hanging around" the car when seen by the night shed foreman or his fellow-employee and Mr. Berry.

To say that the unknown person did more than put the car in motion is to say something that is not proved, though if it were it could make no difference. A car started must keep on running until it collides with some other object heavy enough to stop it, or until it runs through an open switch or "jumps" the track, or becomes disconnected from the power wire: it needed no guiding hand. To talk of the car being stolen is of course nonsense. And to say that no one could imagine that any one would put the car in motion is, I have no doubt, quite as inaccurate as to say that no one could help expecting it. The manner in which it was left for hours during the night could not but be an incentive to impulses to set it going. Toronto is a university town, and in war-time a military town, said to contain about a half million inhabitants; Front street is, as its name implies, a front street; the buoyant, impulsive, adventurous spirit of youth has not yet, fortunately, departed; and, unfortunately, malice, revenge, destructiveness, and impertinent curiosity are not yet dead; nor are soldiers yet deprived of their pipes and fed on lollipops; nor is a sense of humour dead altogether. The youths or young soldiers who would pass by such a tempting opportunity for a run, a harmless run, or even a harmful one, in the car, leaving it with a note of thanks pinned to it, for the thoughtfulness of the company in providing the carriage all ready for them, and thus affording them the unique experience of a run in a car that was not overcrowded, are different youths and soldiers—if really there be any such—from those of other days, and much perhaps less likely to be among those who make the best soldiers and men. To say that no one would think of setting the car in motion, and then to cite the case of the two soldiers who did not permit the hulking steam lorry to remain unattended even "momentarily," and then again the case of the boys breaking into the locked van and setting it in motion, is to be inconsistent and prove the contention unfounded. A car at night, open and fully lighted and ready to go upon a main street,

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cannot but attract travellers as well as others; and I am bound to say that any entering it, expecting to be carried on their way by it, might well be tempted to put it in motion on finding it only a deceiver of weary travellers; and, as I have said, setting it in motion was a simple matter, simpler than setting an automobile car in motion, and there are few in these days who cannot do that. Only to-day we have been told of the case of 3 children, girls, 4, 6, and 8 years of age, doing so, with a result the same as in this case—an electric line post run into and broken down.

The defendant's negligence need not be *the* proximate cause of an injury to give a right of action: it is enough if it be *a* proximate cause, or effective cause. The defendants' wrongdoing was surely proximate enough, and effective enough; without them, and even with some of them and one simple, everyday, and I may say every-door, precaution, the injury could not have been caused—the "third person" was powerless: and, more than that, their negligences were the proximate and effective cause of the third person's wrong—they tempted and induced the impulse to do the wrong, as well as supplied, all ready at hand, the means to give effect to it, whether tempted and induced or not.

We are sure to reach a wrong conclusion if we treat this case as one of ordinary negligence, if we forget, or fail to give due weight to, the fact that the thing which did the injury was an exceedingly dangerous thing, owned by the defendants, and placed by them wrongfully where and in such a state as to make it most likely to do the greatest wrong and mischief. We are in more danger of missing the mark if we treat this case as one of negligence merely, overlooking the fact that it is one of nuisance, a public nuisance fraught with great danger and accompanied by gross neglect of common precautions: see *Crane v. South Suburban Gas Co.*, [1916] 1 K.B. 33, and *West v. Bristol Tramways Co.*, [1908] 2 K.B. 14.

I would dismiss the appeal; affirming the judgment appealed against, which seems to me to be well supported by the judgment of the Supreme Court of Canada in *Geall v. Dominion Creosoting Co. Limited* and *Salter v. Dominion Creosoting Co. Limited*, upon which the learned County Court Judge relied, even though cases of negligence only.

Appeal allowed (MEREDITH, C.J.C.P., dissenting).

[APPELLATE DIVISION.]

JOHN HALLAM LIMITED v. BANTON.

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Sale of Goods—Sale by Sample—Opportunity for Inspection—Inferior Goods Delivered—Acceptance—Caveat Emptor—Conditions—Warranty—Breach—Damages.

The plaintiffs bought from the defendants about 50,000 lbs. of wool; the agreement of sale was made by a telephone conversation after a sample had been asked for and sent. On the day of the sale, the 5th January, 1918, the plaintiffs wrote to the defendants a confirming letter, speaking of the purchase as of "48 to 50,000 lbs. of . . . wool at 40c per lb. . . . sample expressed to us on December 31st. . . . The writer," the plaintiffs' assistant-manager, "will go up and have the wool weighed." The assistant-manager went up to the defendants' mill; the wool was weighed and taken over by him, and afterwards paid for. He might have then and there inspected the wool, but did not do so. The wool was resold by the plaintiffs upon the same sample; it turned out that it was inferior to the sample, and was thrown back on their hands.

In an action for damages for breach of the contract, the trial Judge (MIDDLETON, J.), found that the sale was a sale by sample; that the letter of the 5th January truly set forth the terms of the sale; and that the bulk was inferior to the sample. He gave judgment for the plaintiffs, assessing their damages at 15 cents per lb., or \$7,500, the difference in value between the thing contracted for and the thing delivered.

This judgment was affirmed by a Divisional Court (MEREDITH, C.J.C.P., dissenting as to damages).

Per RIDDELL, J. (BRITTON, J., concurring):—In the case of contract for sale by sample, conditions are implied: (1) that the bulk shall correspond with the sample in quality; (2) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (3) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. If, after an opportunity is afforded to the buyer to compare the bulk with the sample, he proceeds to take the goods into his possession or deal with them, he will not be allowed to repudiate the bargain *in toto* and maintain that the property has never passed, but is driven to rely upon the first implied condition, which in effect becomes a warranty on change of ownership. But taking the goods into his possession and dealing with them after an opportunity to inspect will not necessarily be considered an acceptance of the goods as answering the contract and a waiver of the first condition. The rule *caveat emptor* does not apply to a sale by sample: *Barnard v. Kellogg* (1870), 10 Wall. U.S. 383, 388. If there has been no acceptance by the buyer of the goods as answering the contract, although there be acceptance sufficient to pass the property, he may still rely upon the warranty that the bulk shall correspond with the sample: *Kahn v. Duché* (1905), 10 Commercial Cases 87. There was nothing in this case to indicate that there was an acceptance by the plaintiffs of the goods as answering the warranty; and the damages had been assessed on the proper principle.

Per LATCHFORD, J.:—Where an article has been accepted by the buyer, terms which in their origin were conditions, the breach of which would entitle him to reject, must be treated for remedial purposes, *ex post facto*, as warranties, for the breach of which compensation can be sought only in damages. If the breach is of a condition and not of a warranty, the buyer will nevertheless have the remedies applicable to a breach of warranty: *Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394, 395. The resale by the plaintiffs before the wool was delivered, and the payment to the defendants of the price, precluded the plaintiffs from denying acceptance, but did not impair their right to bring an action for damages for breach of warranty. The damages found were estimated on a proper principle, and there was evidence supporting the amount awarded.

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Per MEREDITH, C.J.C.P.:—The sale was a sale by sample; and admittedly one in which the goods were to be delivered and the price paid concurrently, and property and possession to pass, at the defendants' mill, all of which took place accordingly. There were no express terms of the sale, and the implied terms were conditions that the purchasers should have reasonable opportunity for comparing the bulk with the sample, and that the sample fairly represented the bulk. The conditions were fulfilled as far as the opportunity for comparison of bulk with sample went; the assistant-manager did in fact make some slight examination at the defendants' mill; the plaintiffs at least had the opportunity, and so the condition was performed. There is no decision, at common law, that a purchaser who has the opportunity to inspect, but does not, can sue for, or as if for, a breach of warranty, though it was often said that he might: now in England he may under the Sale of Goods Act, but that gives no right to sue here, and in some respects it departs from the common law: see *Thornett & Fehr v. Beers & Son*, [1919] 1 K.B. 486. On principle it is difficult to see why the general *caveat emptor* rule should not apply to such a case. But in this state of the law of contract of sale of goods by sample, the plaintiffs might rightly have been held to have a right of action against the defendants for damages; and, however that right of action might be considered to have arisen, the measure of the damages should be the same—the loss directly and naturally resulting, in the ordinary course of events, from the breach of the contract. Evidence as to the course of business between the same parties in regard to inspection or examination and accepting delivery of goods was relevant as shewing opportunity for inspection, but was unnecessary.

As to damages, no more than the actual loss could be recovered. The proper method of assessment was by ascertaining what loss the plaintiffs would have sustained if they had promptly taken reasonable means to dispose of the goods to the best advantage.

AN action for damages upon a purchase of about 50,000 lbs. of wool. The plaintiffs, the purchasers, alleged that the sale was by sample and that the bulk was not equal to the sample.

October 15, 1918. The action was tried by MIDDLETON, J., without a jury, at a Toronto sittings.

W. N. Tilley, K.C., and J. P. White, for the plaintiffs.

L. E. Dancey, for the defendants.

October 16, 1918. MIDDLETON, J.:—The sale was made by a telephone conversation after a sample had been asked for and sent. On the day of the sale (the 5th January, 1918), the plaintiffs sent a confirming letter, speaking of the purchase as "of 48 to 50,000 lbs. of the mixed grey and black wool at 40c. per lb. . . . sample expressed to us on Dec. 31st." After asking about arrangements for cars, the letter adds: "The writer will go up and have the wool weighed." This letter was received and read by the defendants but was not answered.

What is said to be a copy of a letter from the defendants to the plaintiffs is produced, but this was never received by the

plaintiffs. This confirms the contract as a sale "of about 50,000 lbs. of gray shoddy wool . . . price 40c. per lb. f.o.b. Blyth. . . . You to come as usual to take over stock."

This, it is argued, makes the sale subject to inspection and acceptance of quality at Blyth.

If this was the intention of the writer (the defendant Frank Bainton), he knew that it was not the plaintiffs' view when he (Frank Bainton) received the letter of the 5th, and it was incumbent upon him to answer the letter of the 5th.

At the examination for discovery he (Frank Bainton) speaks of the sale as a sale by sample, and at the trial his evidence is not in accord with the letter; if accepted at its face, it would indicate an attempt to add a term to the contract, after a parting remark which would probably not be fully appreciated by the person to whom addressed.

In view of the whole evidence, I prefer to accept the evidence of Mr. Arscott (the asisstant-manager of the plaintiffs and the writer of the letter of the 5th January), and find that the transaction was a sale by sample, and that the letter of the 5th January truly set forth its terms.

A sample (exhibit 18 and 19) is produced, and some controversy exists as to this being the sample by which the goods were sold. I find that this is the very sample furnished by the defendants, and on the basis of it the contract was made.

It is admitted that the goods sent were not in accordance with this sample, but much inferior. One of the defendants says this sample was worth 57-60 cents as against the contract-price of 40 cents.

An actual trying out of two bags (nearly 500 lbs.) of the wool sent shewed that about 25 per cent. weight was "dirt," i.e., wool that had been so often fabricated into cloth and then put through the shoddy-mill as rags that it was so broken as to have lost the quality of wool and had become short, broken fibres of no value whatever. In addition to this, there was "waste," i.e., fibres not quite so short but of very little value, and some fair shoddy. About 25 per cent. consisted of low grade wool.

When there was such a scarcity of wool of any kind upon the market that anything having a semblance of wool could be sold, some of this stuff was disposed of. A large quantity is still on hand and may be on hand for a long time.

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I fix the damages at 15 cents per lb. or \$7,500, estimating this as the difference in value between the thing contracted for and the thing delivered. This, as I understand the law, is the measure of damages unless a case for special damage is made out.

I think the defendants should have the right to take over the goods on hand (on paying the amount of this judgment) within a reasonable time, at this reduced price, 25 cents plus interest at 7 per cent. and a fair allowance for freight, storage, etc. If they elect to do this, and the parties cannot agree, I may be spoken to. Unless this matter is mentioned to me within 10 days, this will form no part of the formal judgment.

I have not discussed the cases because, upon the finding of fact, the law is simple. The mere fact that there was a sample does not necessarily make the sale a sale by sample with its implied warranty that the bulk is up to sample, and in some cases it is not easy to ascertain the true nature of the contract, but when once this is ascertained there is no trouble.

Other cases cited deal with the implied warranty upon sale by a manufacturer—these form no guide when the sale is a sale by sample.

Mr. Dancey asks, why any visit to Blyth at all if not for inspection? The answer is in the letter of the 5th, for it says this was “to have the wool weighed.” No doubt there might have been an inspection then, but there was not, and it is idle to contend that the plucking of a little wool from the holes in a few odd sacks was in truth any attempt to inspect the contents of the whole 215 sacks. It is not thus that an inspection of wool is made.

The defendants appealed from the judgment of MIDDLETON, J.

February 17, 1919. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

D. L. McCarthy, K.C., and *L. E. Dancey*, for the appellants, argued that the plaintiffs were not entitled to damages, as they had accepted delivery of the wool after they had an opportunity of inspecting it: Wyatt Paine's Commentary on the Canadian Law of Simple Contracts, p. 205; *Perkins v. Bell*, [1893] 1 Q.B. 193; *Towers v. Dominion Iron and Metal Co.* (1885), 11 A.R. 315; *Horsfall v. Thomas* (1862), 1 H. & C. 90. The rule *caveat emptor*

applies. The course of dealing in similar transactions between the same parties should be considered. In any event, the damages were excessive: *Loder v. Kekulé* (1857), 3 C.B.N.S. 128.

W. N. Tilley, K.C., for the plaintiffs, respondents, contended that the rule *caveat emptor* did not apply to a sale by sample. Even after acceptance of the goods and dealing with them subsequent to inspection, the term that the goods shall correspond with the sample is not waived. The purchaser still has his right to sue for breach of the implied warranty that the bulk is equal to the sample: *Mondel v. Steel* (1841), 8 M. & W. 858.

McCarthy, in reply.

May 16. RIDDELL, J.:—This is an appeal from the judgment of my brother Middleton at the trial in favour of the plaintiffs.

The facts of the case are accurately and sufficiently stated in my learned brother's reasons for judgment.

This is a case of contract for sale by sample, and the law in such a case is accurately stated in Halsbury's Laws of England, vol. 25, p. 161, para. 288, as follows:—

"In the case of a contract for sale by sample the following conditions are implied:—

"(1) that the bulk shall correspond with the sample in quality;

"(2) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

"(3) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample;" citing, among other cases, *Drummond v. Van Ingen* (1887), 12 App. Cas. 284.

The second of these implied conditions—as to which see *Lorymer v. Smith* (1822), 1 B. & C. 1—is for the purpose of enabling the buyer to determine whether he will take the property in the goods at all. If, after an opportunity is afforded to the buyer to compare the bulk with the sample, he proceeds to take the goods into his possession or deals with them, he will not be allowed to repudiate the bargain *in toto* and claim that the property has never passed, but he is driven to rely upon the implied warranty that the bulk shall correspond with the sample—the condition to that effect becoming a warranty on change of ownership, on the principle laid down in *Behn v. Burness* (1863), 3 B. & S. 751

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(Cam. Scacc.); *New Hamburg Manufacturing Co. v. Webb* (1911), 23 O.L.R. 44—*Couston v. Chapman* (1872), L.R. 2 Sc. App. 250, especially *per* Lord Chelmsford, at p. 254.

Accepting the goods in this way has its dangers for the purchaser, because very little will sometimes estop him from saying that such an acceptance of the goods is not an acceptance of the goods as satisfying the warranty. Any purchaser may, if he sees fit, waive any objection to the goods—*quilibet renuntiare potest juri pro se introducto*—and his conduct in taking the goods and dealing with them will be scrutinised with some care, and in some instances will result in his being considered to have waived objection to the goods: *Parker v. Palmer* (1821), 4 B. & Ald. 387.

But his taking the goods into his possession and dealing with them after an opportunity to inspect, or even after a partial or casual inspection, will not necessarily be considered an acceptance of the goods as answering the contract and a waiver of the term that the goods shall correspond with the sample.

The rule *caveat emptor*, it has been held, does not apply to a sale by sample: *Barnard v. Kellogg* (1870), 10 Wall. (U.S.) 383, at p. 388.

If there has been no acceptance by the purchaser of the goods as answering the contract, although there is an acceptance sufficient to pass the property, he may still rely upon the warranty that the bulk shall correspond with the sample.

This principle is so plain that it is difficult to find authority for it. It has, I think, been taken for granted in some instances; but I have been able to find only one case in which the point was actually decided. In *Kahn v. Duché* (1905), 10 Commercial Cases 87, the defendants were merchants carrying on business at New York; they bought from the plaintiff certain cases of Cocos butter to be shipped to them from England to New York—"Quality, packing, etc., as per our sample shipment made to New York on October 30 last. . . . Payment net cash after inspections of goods immediately on arrival of steamer to New York, result to be cabled." The defendants superficially examined the goods on their arrival at New York, and did not detect any defect in them, but beyond this there was no inspection of the goods on arrival. The goods were found not to be in accordance with the sample. The plaintiff sued for the price, and his counsel argued that, "by

the words 'Payment net cash after inspections of goods immediately on arrival of steamer to New York, result to be cabled,' the defendants were under an obligation to inspect the goods immediately on the arrival of the steamer and to cable the result, and if upon the arrival of the steamer they did not immediately inspect the goods they must be taken to have waived their right to claim damages if the goods were not in fact in accordance with contract. So if they inspected and failed to discover the defect and in consequence did not reject the goods." But Bigham, J., held that "the clause 'Payment net cash after inspections of goods immediately on arrival of steamer to New York, result to be cabled,' does not deprive the defendants of the right to claim damages if the goods are not in accordance with the contract even though they do not inspect or by mistake do not on inspection discover the defect in the goods and I so direct the jury."

There is nothing in the present case indicating that there was an acceptance by the plaintiffs of the goods as answering the warranty, and I think an action lay.

The damages seem to have been assessed on the proper principle, and I am of opinion that the appeal should be dismissed with costs.

I have had occasion to consult a great many cases which have more or less bearing on the matters in question, but do not think it necessary to do more than refer to one or two: *Heilbutt v. Hickson* (1872), L.R. 7 C.P. 438; *Wells v. Hopkins* (1839), 5 M. & W. 7; *Lucy v. Mouflet* (1860), 5 H. & N. 229; *Grimoldby v. Wells* (1875), L.R. 10 C.P. 391.

BRITTON, J., agreed with RIDDELL, J.

LATCHFORD, J.:—This is an appeal from the judgment of Middleton, J., of the 16th October, 1918, awarding the plaintiffs \$7,500 damages for breach of warranty.

The contract was for the sale by sample of 48-50,000 lbs. of mixed grey and black wool, at 40 cents a pound, delivered at Blyth, where the defendants carried on business. The wool was to be "up to" a certain sample expressed to the plaintiffs about 5 days before the contract was made by telephone.

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In their letter confirming the purchase, the defendants were informed that the wool had been resold to one Cram, of Carleton Place, and that the writer of the letter would proceed to Blyth to have the wool weighed.

The resale to Cram had been made upon the same sample as the purchase, and before the plaintiffs had any opportunity of inspecting the wool.

Such an opportunity was afforded later when the plaintiffs' representative was at Blyth weighing the wool; but no inspection was in fact made.

Delivery was accepted by the plaintiffs, and the wool was paid for in the belief that the bulk was according to the sample.

The wool was forwarded by rail direct from Blyth to Carleton Place. It arrived at its destination after the plaintiffs had sent the defendants a cheque in payment for it. Cram rejected the wool as inferior to the sample—much of it was unfit to be described even as "shoddy wool"—and it was thrown back on the plaintiffs' hands.

There was undoubtedly a breach of the implied warranty that the bulk was fairly equal to the sample, and there is evidence, credited by the trial Judge, that the difference in value at the time between what was delivered and what was sold amounted to \$7,500, the sum for which he gave judgment in favour of the plaintiffs.

It is urged on behalf of the defendants that the plaintiffs are not entitled to this or any other sum as damages, as they accepted delivery of the wool after they had had an opportunity of inspecting it.

Towers v. Dominion Iron and Metal Co., 11 A.R. 315, is relied on to support this contention. In that case the defendants bought by sample a quantity of cotton waste to be delivered at St. Catharines for shipment to Toronto. They afterwards directed that the waste should be shipped to Cincinnati. No evidence was given that the waste could not have been inspected at St. Catharines. On arrival at Cincinnati the goods were rejected as greatly inferior to sample. The action was upon the defendants' acceptance of a bill of exchange drawn by the plaintiff for the price of the waste. The defence set up was that the goods were not according to sample, and had not been accepted. The

defendants did not counterclaim for damages. An application at the trial to amend their defence in a manner not indicated was not entertained by the trial Judge. Probably the defendants asked permission to set up a counterclaim. The jury found that the waste did not correspond with the sample. The defendants appealed. The refusal of the trial Judge to allow the defendants to amend was not made a ground for the appeal. The Court of Appeal held that by accepting the bill of lading of the goods the defendants assumed the complete ownership. "The property became indefeasibly vested in them, and . . . they retained no right to revest it in the plaintiff because it was not equal to sample:" Hagarty, C.J.O., at p. 318. But the learned Chief Justice, citing Parke, B., in *Mondel v. Steel*, 8 M. & W. 858, at p. 870, is careful to point out that such absolute acceptance does not interfere with the right of the defendants to seek for damages in consequence of the inferiority of the article to the quality represented. He adds, at p. 320: "I am strongly of the opinion that the only remedy in the case before us must be by cross-action." Osler, J.A., says, at p. 325: "They (the defendants) have not counterclaimed for it" (the difference in value) "in the action, and from the course taken at the trial the learned Judge thought he ought not to permit them to amend, and left them to their cross-action. I think we cannot interfere with his decision."

Perkins v. Bell, [1893] 1 Q.B. 193, is another case relied on in support of the defendants' contention. There the plaintiff, a farmer, had sold by sample to the defendant, a corn-dealer, a quantity of barley to be delivered at a railway station near the plaintiff's farm. While the plaintiff knew that the barley was bought for resale, he did not know when the resale would take place. The defendant resold the barley by the same sample to a brewing company. The barley was delivered at the railway station, and a sample of it was sent by the station-master to the defendant at his request. Having inspected the sample, the defendant instructed the station-master to ship the barley to the brewers. They rejected the barley as not equal to the only sample shewn to them, and the defendant then claimed that he was entitled to reject it. The Court held that, in the circumstances, the defendant must be considered to have accepted the barley, and could not afterwards refuse it.

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This case is far from deciding that, having accepted the goods, the vendee could not bring an action for breach of warranty.

Where an article has been accepted by the buyer, terms which in their origin were conditions, the breach of which would entitle him to reject, must be treated for remedial purposes, *ex post facto*, as warranties, for the breach of which compensation can be sought only in damages.

This, no doubt, was what was in the minds of Hagarty, C.J.O., and Osler, J.A., in the *Towers* case, when they stated that after acceptance the buyer's only remedy was by a cross-action.

In *Fielder v. Starkin* (1788), 1 H. Bl. 17, 2 R.R. 700, where a horse warranted sound was retained by the purchaser for 6 months, it was held that, the horse being unsound at the time of sale, the seller was liable to an action on the warranty.

In *Parker v. Palmer*, 4 B. & Ald. 387, while it was held that the defendant had by his dealings with the goods precluded himself from asserting that they did not correspond with the sample, Abbott, C.J., says, at p. 392: "The general rule undoubtedly is, in the case of a sale by sample, that the purchaser may reject the commodity, if it does not correspond with the sample; but every man may waive a rule of law which is in his own favour." Holroyd, J., says, at p. 393: There "is a collateral contract on the part of the seller, that the goods should correspond with the sample. If they do not answer the sample, the effect of that is, that the defendant may not be bound to accept them; or, if he does so, he may have a right of action for the damages he sustains by reason of their not corresponding with the sample." He concludes by saying (p. 394) that the plaintiff could insist that the defendant take and pay for the goods, subject to the right of the defendant "to bring an action for damages, on the ground that they did not correspond with the goods actually agreed for." Best, J., after pointing out that the defendant was in no condition to answer an action for goods sold, said (p. 395): "He may still bring an action for breach of the warranty."

To the same effect is the decision in *Poulton v. Lattimore* (1829), 9 B. & C. 259, where the law is admirably stated by Andrews Serjt., *arguendo*, at p. 261: "From the very nature of the contract of warranty the vendee has a right to keep the goods, and to recover damages for a breach of the warranty. He may

either rescind the contract *in toto* by returning the goods speedily, and while they remain in the same state, and refuse to pay the price, or recover it in case it has been paid, or he may retain the goods, and recover the difference between the real value and their value as warranted."

If, contrary to my opinion, the breach is of a condition and not of a warranty, then the language of Lord Loreburn, L.C., in *Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394, at p. 395, seems pertinent:—

"If a man agrees to sell something of a particular description he cannot require the buyer to take something which is of a different description, and a sale of goods by description implies a condition that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as if it was a breach of warranty, that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty *ab initio*, but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty.

The resale by the Hallam company to Cram before the wool was delivered, and the payment to the defendants of the price of the wool, precluded the plaintiffs from denying acceptance, but did not impair their right to bring action for damages for breach of warranty. The damages found are estimated upon a proper principle, and there is evidence supporting the amount awarded.

I am therefore of opinion that the judgment should be affirmed and the appeal dismissed with costs.

MEREDITH, C.J.C.P.:—A good deal of discussion took place at the trial, and some here also, upon a question whether the bargain between the parties, out of which this action has arisen, was more accurately stated in a letter, of confirmation of it, written by the plaintiffs to the defendants, or in a letter, of confirmation of it, said to have been written by the defendants to the plaintiffs: but, if the sale in question were one by sample—and

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I did not understand that any contention to the contrary was made at the trial or here—nothing very substantial turns upon that question. The difference between the parties upon this question is: the defendants asserted that it was expressly agreed that the plaintiffs were “to come, as usual, to Blyth and take over the stock,” and the plaintiffs denied it; but, whether it was or was not usual for the plaintiffs to come to Blyth and there inspect and take over the “stock,” it would be incumbent upon them to do so in this case, as, admittedly, delivery of, and payment for, it were to be made there at the one time; and, if any inspection, examination, or comparison were to be made, there was the place and that the time. If it were contended that the sale was not one by sample, but was one in which the buyers were to examine for themselves, and take or reject the goods upon their own judgment, the question might be one of some moment. The case of *Barnard v. Kellogg*, 10 Wall. (U.S.) 383, affords an instance of that kind. Should it be needful, however, to determine this question here, I should agree with the trial Judge in his finding that the plaintiffs’ letter set out the terms of the agreement truly; and should so agree mainly because the defendants admittedly received and read that letter, and yet found no fault, at any time before action, with its statements.

I treat the sale, therefore, as a sale by sample: and it was admittedly one in which the goods were to be delivered and the price paid concurrently, and property and possession to pass, at Blyth; and all that took place there accordingly, though, for the defendants’ convenience, the plaintiffs’ cheque for the price of the goods was retained by them and payment made a short time afterward in Toronto.

There were no expressed terms of the sale, and the implied terms were conditions that the purchasers should have reasonable opportunity for comparing the bulk with the sample, and that the sample fairly represented the bulk: if either of these conditions was unfulfilled, the purchasers could reject the goods and recover damages for breach of contract; but the conditions were fulfilled as far as the opportunity for comparison of bulk with sample went. The plaintiffs’ assistant-manager, the witness Arscott, who made the bargain for the plaintiffs, and who is an experienced wool-buyer, quite competent to make the comparison as well

as deal with all other features of the transaction, went to Blyth, by appointment, to close the transaction and pay the price, and was there parts of two days, and then and there closed it except for the postponement of the payment, for the defendants' convenience, as I have said. He had every opportunity for examining and comparing the bulk with the sample that he chose to take; and upon the weight of evidence it must be found, as the trial Judge seems to have thought, that some slight examination was made by him, as detailed by four of the witnesses. That the examination of even one bag of the wool would have disclosed the real quality of it, and that an examination was a simple matter, is shewn by the testimony of the plaintiffs' purchaser and witness, Cram, in these words:—

"Q. To what extent did you examine the bulk to ascertain whether or not it was up to the sample? A. We ripped down the side of a sack, where it was sewn. It will stand up, and we can observe it, and can see immediately where the wool, the shoddy, and the droppings are. We could immediately see that it was not up to the sample, after buying it and looking over the sample.

"Q. Were any of them up to the sample? A. None whatever, that I saw.

"Q. Some of them poorer than others? A. Some of them poorer than others. Of course they varied. Some were certainly almost worthless."

And that the examination might, and should, have been made at Blyth, is obvious; as to its feasibility, the assistant-manager grudgingly admits it thus:—

"Q. You weighed out the whole of the wool, the 215, on the 10th? A. Yes.

"Q. Every sack of it passed under your own observation when it was weighed? A. Yes.

"Q. If you had examined the wool at that time, you could have found all these defects, could you not? A. If I had examined it, I suppose I could have.

"Q. If you had examined the wool in Blyth on the 10th of January, you could have found all the defects you now complain of? A. I suppose I could have.

"Q. Did you examine any of the wool at all? A. No.

"Q. Why? A. It was not necessary."

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Why the wool was not more carefully examined seems to me to be manifest. There was such a dearth of wool and such a need for it, to keep the mills going, that it was not so much a matter of quality as it was to get it of any quality, and at the price of 40 cents a pound, at that time, only lowest quality could be expected. One of the plaintiffs' witnesses stated the market condition then in these words:—

"Q. What do you say—if you are in a position to say—what is the difference in value between the bulk you found at Hallam's and this sample? A. It depends upon the manufacturer.

"Q. The market? A. It has no market-value, unless you can find a man who wants to use it. There were exceptional circumstances. Wool was very, very scarce in Canada all last spring. A good many mills could not get wool, they could not get imports through the country. We were expecting a large amount through the Wool Commission from Australia. We were expecting it to arrive in April or May. It did not arrive until June, and in the meantime they had to use whatever they could get. Some of our manufacturers who were working on gray blankets were glad to pick up almost anything."

The matter of examination of the wool, and comparison with sample, was admittedly discussed when the wool was being weighed and placed in the cars for shipment to the plaintiffs' purchaser: what was said was stated by the defendants thus:—

"Q. What was said about sewing them up, in Mr. Arscott's presence? A. He turned around and said 'What about Bert sewing those sacks up?' My brother said 'Do you want to see anything more about it, Fred?' and Fred said 'Better go on and sew them up,' that he did not want to see any more of them—what could you expect for 40 cents? I did not know whether he had looked it over, or how much he had looked through the wool. I had no idea of what he had looked into the wool at all.

"Q. Who made use of the expression as to the 40 cents? A. Fred Arscott."

The assistant-manager's version, of what took place, was stated thus:—

"Q. Are you sure the three sacks were not in the first warehouse, quite close to where you were weighing? A. They were not.

"Q. You are quite sure about that? A. Yes.

"Q. Nothing was said about your going to examine them?
A. No.

"Q. Did Frank Bainton ask you if you wanted to see these three sacks before they were sewed up? A. No.

"Q. Did you make any remark—"Oh, what can you get for 40 cents?" A. No, sir.

"Q. When he asked you if you wanted to see the wool? A. No. It was made by himself.

"Q. By whom? A. Frank Bainton.

"Q. How did he come to make that remark? A. I said 'I hope this comes out according to sample,' and he says, 'Hell, what can you expect for 40 cents?'

"Q. He said that? A. He said that."

But why the plaintiffs did not make any more thorough examination and comparison before the property in the goods passed to them may be unimportant, the important thing may be that they had the opportunity, that the condition in this respect was not broken but was fully performed.

The learned trial Judge seems to have thought that the question was: whether there had been an "inspection;" and, finding that there had not been a real inspection, he considered that the plaintiffs might recover damages for deficiency in quality.

Upon an ordinary sale of goods to which the injunction *caveat emptor* applies, there is plainly no such difference, that is, according to the law of this Province. It is the purchaser's own fault if he neglect his opportunity: he may of course waive or neglect it, but, if he do, he can be in no better position than if he had examined and accepted. The rule at common law plainly was that the *caveat emptor* rule applies when the goods "may be inspected and examined by the buyer:" see *Jones v. Just* (1868), L.R. 3 Q.B. 197; though apparently, under the Sale of Goods enactment, the law in that respect has been changed in England: see *Thornett & Fehr v. Beers & Son*, [1919] W.N. 52, [1919] 1 K.B. 486.

That, however, does not dispose of this case, it requires the consideration of a more difficult question, namely: whether upon a sale by sample, with or without an examination, when an examination can be had, the buyer can recover damages if the goods received are not equal to the sample.

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I should have thought that such a thing is so manifestly unfair that it could hardly be and ought not to be the law; and cannot but think that such a proposition would be derided by traders. The purchaser having the right to examine and compare and to reject, fairness requires that he should "take or leave" the goods, before property or possession passes to him. To permit him to take them, and, in truth—however the truth may be avoided sometimes in the supposed interest of justice—turn a condition into a warranty *ex post facto*, and subsequently whenever he pleases bring an action for, or as for, breach of warranty of quality, in the meantime doing as he pleases with the goods, appears to me to be too one-sided to be fastened upon any seller by implication of the Courts, even though composed of buyers continuously, sellers seldom if ever. The reason and fairness of the thing seems to me to make the application of the *caveat emptor* rule proper: if the goods be rejected they remain in the possession of the seller, who, in most cases, sells again without loss, and so the matter ends without litigation; whilst whatever sales he makes are made to the best advantage in his own interests for the credit of his own goods, and the maintenance of his contention that they were of good quality: whilst, on the other hand, the buyer's interests are to maintain his contention that they are of inferior quality, and, as the seller is to make good the loss, anything that tends to prove inferiority is welcome to him; and deterioration is not likely to be guarded against; and, beside all this, the ability to make evidence is, with the goods, in his hands. This case affords an instance: no attempt to sell the goods was made from January to April, nor indeed at any time: such sales as were made, at prices almost saving all loss, seem to have been the result of buyers seeking the goods: and the whole evidence shews that if the goods had remained with the sellers they could easily have sold them at more than the price the plaintiffs were to pay. Then there seems to have been a loss of over 1,200 lbs. in weight, said to have been caused by evaporation; and no doubt abstractions for samples, examinations, and other things—including a shortage of one bag of the 215. Until the new wool came in during the summer, sales could be made at extraordinary prices of anything in the shape of wool, as the evidence I have read shews: after that, such wool as that in question found no pur-

chasers, its chances had been thrown away, because the goods were in the buyers' not the sellers' possession and control.

There are passing observations of a general character to be found here and there which taken by themselves indicate that the buyer by sample has an implied warranty as to quality; but neither the industry of my learned brothers, nor my own efforts, has discovered any case at common law, anywhere, in which it has been decided that a buyer by sample, who has compared bulk with sample, or might—if he chose to do so—have made the comparison, and have rejected the goods if not fairly represented by the sample, could yet, after property and possession had passed to him, have a valid claim upon a warranty of quality.

The *obiter* observations of Holroyd, J., that there "is a collateral contract on the part of the seller, that the goods should correspond with the sample," and of Best, J., that the plaintiff "may still bring an action for breach of the warranty," could not be made in these days; the judgment of the House of Lords in the Sanfoin case, *Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394, forbids: the obligation as to quality is not a warranty but a condition. The true rule is thus stated by Abbott, C.J., at the same time: "In justice and conscience . . . he ought to be estopped from objecting that the goods did not correspond with the sample," after comparing or having had reasonable opportunity to compare bulk with sample: *Parker v. Palmer*, 4 B. & Ald. 387.

The case of *Mondel v. Steel*, 8 M. & W. 858, was a case of an action upon a warranty, and not upon a sale by sample: nothing more need be said of it, or of any other case upon a warranty.

In the case of *Towers v. Dominion Iron and Metal Co.*, 11 A.R. 315, the observations of Hagarty, C.J.O., and Osler, J.A., had not reference to any implied warranty, but plainly meant a counter-claim upon an expressed contract "that if the goods did not equal the sample, Towers would allow the difference:" see p. 325.

In *Heilbutt v. Hickson*, L.R. 7 C.P. 438, the bulk did correspond with the sample, it was the sample that was at fault; and so the observation of Bovill, C.J., on the subject, may be taken to have reference to such a case as that where a condition as to correspondence of bulk with sample would have been useless.

The case of *Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394, was also one in which a comparison of bulk with sample

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would have been futile: the kind of seed bought could not be distinguished by sight from the wrong kind which was delivered. What the buyers succeeded upon had nothing to do with the sample, it was upon the fact that the sellers never fulfilled their contract, they did not deliver the seed they sold, but did deliver seed of another kind.

And such cases as *Mody v. Gregson* (1868), L.R. 4 Ex. 49, and *Drummond v. Van Ingen*, 12 App. Cas. 284, are also cases in which comparison would not help the buyer to beware: and which go to shew that relief has been given only when an inspection would not help.

It is all very well for a learned author, Benjamin on Sale, to say: that on a sale of goods by sample the vendor warrants the quality of the bulk to be equal to sample, and that the rule is so generally taken for granted that it is hardly necessary to give direct authority for it. It would have been better to have attempted to give direct authority for it—if any could be found—and no one since the decision of *Wallis Son & Wells v. Pratt & Haynes* can very well say that there is such a “warranty.”

The Sale of Goods Act, 1893, has displaced in England the common law on the subject, and has provided (sec. 15 (1)) that a contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect: and that upon such a sale there are the three implied conditions set out in sec. 15 (2); not that there is any warranty; but, under sec. 11, the buyer may waive the condition, or may elect to treat the breach of a condition as a breach of warranty: and sec. 53 makes provisions in respect of damages where “the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty,” among other cases of breach of warranty.

All this makes it plain that under that enactment a buyer may examine the bulk and compare it with the sample, and then accept the goods, and still have a right of action for damages on the ground that the bulk does not correspond with the sample; a state of the law directly in conflict with the first principle of the common law, upon the subject of sales of goods, expressed in the words *caveat emptor*: and a state of it which, I am sure, would somewhat startle buyers and even sellers here if it were well-known. Under the condition that the buyer shall have a reasonable oppor-

tunity of comparing the bulk with the sample—sec. 15 (2) (b)—the comparison, examination, or inspection, as one may choose to call it, might be had, and, having been had, there remains the implied condition that the bulk shall correspond with the sample—sec. 15 (2) (a)—which the buyer may treat as a breach of warranty—sec. 11 (1) (a): implications, if we have to make them, so one-sided that it seems to me there could be nothing in the mind of any buyer or seller to warrant them.

If that be the law of this Province, the plaintiffs had a right of action as for a breach of warranty, but not on a warranty, the moment the goods passed into their possession at Blyth: they had not a right of action on either condition, because the first had been fulfilled, and it was too late to rely upon the other; the rejection should have been on comparison of bulk with sample before taking possession in such a case as this, in which the opportunity for comparison was given, and, as I have shewn from the evidence, the comparison might easily have been made and would plainly have shewn the condition of the goods for which damages were sought and have been awarded.

The same result might be reached in another way: if the sale in this case were not of certain existing goods which were warranted to be of quality equal to the sample, but was of goods to be delivered corresponding with the sample; then if the goods delivered did not correspond with the sample no right of action for the price agreed upon could arise out of that contract; and if those which were delivered were not accepted in lieu of those which ought to have been delivered, that is, if a new contract were not substituted for the old one, the buyer would have an action against the seller for damages for breach of the contract; but would be liable to the seller for the value of the goods if they were retained, as in this case they were, by the buyer.

In this, as it seems to me, anything but clear and satisfactory state of the law of contracts of sale of goods by sample, the plaintiffs may rightly have been held to have a right of action against the defendants for damages; and, however that right of action may be considered to have arisen, the measure of the damages should be the same, namely, "the loss directly and naturally resulting, in the ordinary course of events, from the breach" of the contract: sec. 53 (2).

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The next question discussed upon this appeal was, whether the ruling of the trial Judge that the course of business in similar transactions between the same parties in regard to inspection or examination and accepting delivery of goods, was irrelevant, was right. It was not, in my opinion, irrelevant, but was unnecessary: it was relevant as shewing opportunity for inspection, as it was called at the trial, of the goods; but, as the goods were to be delivered at Blyth, and the property to pass, and payment for them to be made, there, and as the whole evidence made it plain that there was reasonable opportunity for comparing bulk with sample there, there was no need for that evidence.

And the last question is, whether the damages awarded are excessive. Some witnesses testified that, in their opinion, the goods in the sample were worth one-third more than those in the bulk: and the trial Judge assessed the damages accordingly, that is, at 15 cents a pound on the 50,000 lbs. sold and delivered: the amount allowed being largely in excess of the claim of the plaintiffs in writing filed at the trial, though it included demands of the remotest character.

But the plaintiffs bought at 40 cents a pound and had resold at 45 cents; so that the most they could have made out of the transaction, if there had been no breach of the contract, was one-ninth of the price at which they had sold. And, having regard to the long haggling between the parties as to price, both of them being among the shrewdest of dealers in wool, it could not but be a mistake to take the opinion of some witnesses, contradicted by others, against the actual facts which disproved them, even if the actual loss were not, as it undoubtedly is, the true measure.

Then a considerable quantity of the goods was actually sold at from 42 cents to 45 cents a pound, by the plaintiffs themselves: in the face of these facts, how can the assessment on the basis adopted by the trial Judge, 15 cents a pound, be sustained?

Beside all this, the plaintiffs apparently made no effort to sell the goods: such sales as were made were to dealers who went to them to buy. The facts have not been sufficiently elicited upon this subject, but from such evidence as was given it seems that for several months nothing was done, probably because for part of the time at all events the plaintiffs thought the defendants

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were bound to take the goods back. It seems, from such evidence as has been given, that all of the goods might readily have been sold at from 40 cents to 45 cents a pound, and so little or no loss have been sustained. When the utmost the buyers could have made if the contract had not been broken, and when they could have sold—and did in fact sell in part—for from 42 cents to 45 cents, an award of 15 cents a pound damages is manifestly not an award of compensation, but is a penalty which cannot lawfully be imposed in an action upon a contract.

At this day, it can hardly be contended that, in such a case as this, more than the actual loss can be recovered: see *Hamilton Gas and Light Co. and United Gas and Fuel Co. v. Gest* (1916), 37 O.L.R. 132, 31 D.L.R. 515: that the proper method of assessing the damages is not by ascertaining what loss the plaintiffs would have sustained if they had promptly taken reasonable means to dispose of the goods to the best advantage; means such as they would have taken if the loss was to fall upon them, not upon others. On the contrary, the plaintiffs delayed, and apparently made no effort, to sell; and whilst the goods have been in their possession they have wasted greatly, and such as remain have become worthless because not sold when there was a market for them.

I am in favour of allowing the appeal upon this ground, but upon this ground only, and of referring the matter of assessment of damages to the proper local officer of the Court to be assessed in the manner I have indicated.

*Appeal dismissed (MEREDITH, C.J.C.P.,
dissenting as to damages).*

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[MASTEN, J.]

May 17.

WALKER V. MARTIN.

Motor Vehicles Act—Injury to Person on Foot in Highway by Motor Vehicle Driven by Daughter of Owner—Negligence—Onus—R.S.O. 1914, ch. 207, sec. 23—Evidence—Speed of Vehicle—Contributory Negligence—Liability of Driver—Liability of Owner—Vehicle in Possession of Daughter without Consent of Father—"Person in the Employ of the Owner"—Absence of Contractual Relationship—Sec. 19 of Act, as Amended by 7 Geo. V. ch. 49, sec. 14—Damages.

The plaintiff, on foot upon a street-crossing in a town, was knocked down and injured by a motor vehicle owned by M. and driven by his daughter, aged 20 years. In an action against M. and his daughter to recover damages for the plaintiff's injuries:—

Held, upon the evidence, which was conflicting as to the speed of the vehicle, that the daughter had not satisfied the onus cast upon her by sec. 23 of the Motor Vehicles Act, R.S.O. 1914, ch. 207, by proving that she was not negligent in the driving of the vehicle—indeed her negligence was affirmatively established; and the plaintiff was not guilty of contributory negligence.

(2) That the defendant M. was not liable as owner of the vehicle, under sec. 19 of the Act, as amended by (1917) 7 Geo. V. ch. 49, sec. 14: the "vehicle was in the possession of some person other than the owner without his consent, express or implied;" and the daughter was not "a person in the employ of the owner."

The implied permission to use the vehicle, which would naturally have arisen from the daughter's previous use of it, was negated by the express refusal of M. on the day of the occurrence to allow the daughter to take the vehicle out.

The words "in the employ of the owner" point to something more than a mere right to service, and mean something different from the relationship of a child to its parent—they carry with them an implication of a contractual relationship.

Judgment was pronounced in favour of the plaintiff against the defendant V.M., the daughter, with damages assessed at \$2,000.

ACTION for damages for injury sustained by the plaintiff in consequence of having been run over by an automobile driven by the defendant Vivian Martin and owned by the defendant Edward E. Martin.

April 29. The action was tried by MASTEN, J., without a jury, at St. Thomas.

W. K. Cameron and E. A. Miller, for the plaintiff.

George Lynch-Staunton, K.C., and W. H. Barnum, for the defendants.

May 17. MASTEN, J.:—This is an action brought by the plaintiff for damages alleged to have been sustained by her in consequence of having been run over by an automobile driven by

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the defendant Vivian Martin and owned by the defendant Edward E. Martin. The accident occurred on the 17th September, 1917. At the time of the accident, the plaintiff was walking easterly along the north side of Talbot street, in the town of Aylmer, at the intersection of Talbot and John street north. The defendant Vivian Martin was driving a Ford motor westerly on the north side of Talbot street. After visiting a shop 150 to 200 feet east of John street, she came westerly along the north side of Talbot street, with the intention, as she states, of turning at the intersection of Talbot and John streets and going back easterly on the south side of Talbot street. As she approached the corner of John street she sounded her horn, and as she reached the north-east corner of Talbot and John streets, she partly turned as though she were about to go north on John street. At that moment the plaintiff and a Miss White, who was accompanying her, were proceeding easterly along the street-crossing on the north side of Talbot street, where it intersects John street north. Hearing the defendant's horn, and observing her turn, they thought she was going north on John street, and stood still waiting for her to get out of the way. As to the exact point where they stood, there is some difference of opinion; but, as I understand the situation, the exact spot does not matter. It seems to be common ground that they were about 11 feet east from the sidewalk or footway on the west side of John street. The defendant, after swerving to the right, instead of going northerly on John street, kept on along Talbot street, and ran into the plaintiff and Miss White.

I find that the car knocked the plaintiff down and ran over her. Some differences arose among the different witnesses as to just what portion of her body the car passed over, but it is immaterial to determine between the statements of these different witnesses. The witness White, who accompanied the plaintiff, was not run over; but, according to her own testimony, was thrown by the impact of the car about 11 feet to the sidewalk on the west side of John street, and was a good deal bruised, though not seriously injured in any way.

The plaintiff was picked up by bystanders and walked by herself to a neighbouring office, where she remained a short time and then went elsewhere. Apparently she did not regard herself as having been injured at the moment, though she found herself

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very sore and much shaken up in the course of the next day or two. Some two weeks elapsed before she developed symptoms of very serious nervous trouble. This nervous trouble increased, and she consulted local physicians and afterwards Dr. McCallum at the Victoria Hospital in London, Ontario, where she remained until some time in January, 1918, when she was discharged, the doctor believing that she was practically cured; however, she was not cured, and her difficulties have continued up to the present time. They take the form of traumatic hysteria, and the expert testimony indicates that at the expiry of a year from the termination of this litigation it is altogether probable that the difficulty will entirely cease: meantime she has been unable to work, and has suffered considerable pain and inconvenience, and she will in future be more liable to break down nervously under strain than she otherwise would have been.

Three questions arise: first, whether the defendant Vivian Martin has satisfied the onus cast upon her under the Motor Vehicles Act, sec. 23, by proving that she was not negligent in the driving of the motor which injured the plaintiff; second, whether the father, Edward E. Martin, is, under the circumstances, liable; and, third, if liability exists, as to the amount of the damages.

Dealing then with the first question, I am of opinion that the defendant Vivian Martin has failed to discharge the onus cast upon her by the statute. As is usually the case in actions of this nature, great differences developed in the evidence with respect to the speed of the car. Several disinterested witnesses who were accustomed to drive cars placed the speed at 15 miles an hour; the plaintiff put it at 20, but I am unable to place any great reliance on her statement, having regard to the fact that the car was coming directly towards her and she saw it for only a brief instant, also having regard to the excitement of the moment. The witness Miss White, who was walking with the plaintiff and who was struck, placed the speed at the moderate rate of 10 miles per hour, basing her judgment upon the distance which she was thrown by the motor when it collided with her. On the other hand, the witnesses for the defence indicate that, at the moment when the collision occurred, the car was practically at a standstill. Two witnesses indicate that there was doubt in their minds as to

whether the car had impetus enough to go forward off the body of the plaintiff. It seems to me that the defendant Vivian Martin is placed in this dilemma: if she was going at a speed of 10 or 15 miles an hour, that was quite too high a speed at which to drive the car, having regard to the surrounding circumstances. It might be a question whether it was not a negligent conception for her to think of turning her motor at the intersection of the two busiest streets in the town. At the moment when she came up, there was a garbage waggon headed southerly on John street, standing somewhere near the middle of John street, and very close to the street-crossing. There were also shewn to be a large number of foot-passengers on the edge of the sidewalk, and about these four corners. As the defendant Vivian Martin approached the corner, it became necessary, even if she had not been going to turn, for her to swerve to the right on to the street-crossing where foot-passengers cross, in order to avoid a collision with the scavenger waggon. Her action in sounding her horn and in swerving to the right was liable to lead to the greatest confusion in the minds of foot-passengers like the plaintiff, who were on this street-crossing; and, in my opinion, it was the duty of the defendant Vivian Martin, if she proposed to turn in the manner heretofore described at this point, to have gone at so slow a rate that she could stop her car at any moment within a foot or two, and that 10 or 15 miles an hour, or even 6 or 8 miles an hour, was altogether too high a rate of speed, and shews negligence. On the other hand, if the account of the defendant is to be believed, and she was going so very slowly as is described, there is no excuse or reason why people who were standing directly in front of her, and who were seen by her, and on whose account she sounded her horn, should have been run over. She should have been able to stop dead before she struck them. In either event it seems to me that she was negligent, and I would so find, quite apart from the onus cast upon her by the statute.

Then, with respect to the conduct of the plaintiff herself, and as to her being guilty of contributory negligence, that was scarcely pressed by counsel for the defence; but I am of opinion that in doing what she did, in standing still, she did the wisest and best thing possible to avoid the accident; in any case, the period from the time when the car appeared rounding the corner until she was

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struck would have been no more than about a second, and it would be unreasonable to hold her liable to do, under these circumstances, the very wisest or best thing. But, as I have said, having regard to the whole situation, I think she did the right thing in standing still, though it might have been that, if she had proceeded, the car could have passed between her and the garbage-van.

Coming now to the second question, namely, the liability of the father, this depends upon the interpretation to be placed on sec. 19 of the Motor Vehicles Act, R.S.O. 1914, ch. 207, as amended by (1917) 7 Geo. V. ch. 49, sec. 14. So amended, it reads as follows:—

“The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner without his consent, express or implied, not being a person in the employ of the owner.”

Edward E. Martin was admittedly the owner of the car which occasioned the damage to the plaintiff, and the driving of the car as found above was a breach of the Motor Vehicles Act. In the present case certain strong circumstances exist, tending to indicate the implied consent on the part of the defendant Edward E. Martin to the use of the car by Vivian Martin. First, he is her father, she was living at home, and she had been accustomed to drive his car more or less for five years; the garage was customarily left unlocked. On the morning when the accident occurred, the defendant Vivian Martin drove the car down to her father's shop in Talbot street, and went in to make some purchases, which it is argued would have been unlikely for her to do if she was disobeying an express refusal on his part to allow her to take out the car that day; but, notwithstanding these circumstances, I give credence to the testimony of the defendant Edward E. Martin, when he says that his daughter was never allowed to take out the car except by express and special permission on each separate occasion; that on the occasion in question she asked his leave to take the car out that morning, and he refused, giving reasons. His evidence in this respect is confirmed by the statement of his daughter; and, upon the whole, I give credit to this

testimony, and find that the implied permission to use the car, which would naturally have arisen from her previous use of it, is negated by the express refusal which I have just mentioned.

In the present case the motor vehicle was in the possession of the defendant Vivian Martin, being a person other than the owner; and, having regard to the finding which I have stated above, I must hold that it was in her possession without the consent, express or implied, of her father, Edward E. Martin.

I have, however, felt considerable difficulty as to whether or not she was a person "in the employ of the owner." She was, at the time of the accident, 20 years old—an infant living with her father. There can be no doubt that a father is entitled to the services of his infant daughter at home: she is under his control, and he is entitled to her services; the legal basis of an action for seduction rests upon this footing: *Grinnell v. Wells* (1844), 7 M. & G. 1033, at p. 1041; *Terry v. Hutchinson* (1868), L.R. 3 Q.B. 599; *Maunder v. Venn* (1829), Mood. & M. 323.

It may well be urged where the service is owed by the child to the parent, and the parent is entitled to service from the child, that the act of the child while performing such service is something done in the employ of the parent; but, after giving the matter the best consideration in my power, I am unable to accede to that view. She was not engaged in the performance of any service for her father, but was acting on her own behalf, nor was she entitled to take out the motor contrary to his express directions for the purpose of doing what she was doing.

I think that on a fair interpretation of the words "in the employ of the owner," they mean something more than merely a right to service, and mean something different from the relationship of a child to its parent. They carry with them an implication of a contractual relationship. A slave is in the service of the master, but he could scarcely be said to be in the employ of the master.

I have little doubt that, if the Legislature had contemplated the situation that here exists, such words would have been employed as would have rendered the defendant Edward E. Martin liable; but I am not at liberty to construe the statute according to what I think the Legislature would have enacted had they had the present situation before them, but must construe it according

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to the actual words which have been employed. With considerable hesitation, I am of the opinion that the defendant Edward E. Martin is not liable.

We then come to the question of damages. The out-of-pocket payments are as follows: Dr. McCallum, \$137; hospital, \$181.80; massage, \$30; Dr. McEwen, \$30: total, \$378.80. The plaintiff received her wages from her then employer from the 17th September, 1917, to the 29th October, 1917; that leaves eight weeks in the year of 1917, 52 weeks in the year 1918, and 18 weeks in the year 1919 down to the present time. The statement of the medical expert is that, with this litigation being closed, she may expect to be well again at the end of one year, which would give 52 weeks more, making in all a total of 130 weeks during which she was idle. In that time she apparently earned some small sums, but they are very trivial. Her wages at the time of the accident were at the rate of \$9 per week, which would give a total of \$1,170 as loss of wages; this, being added to the \$378.80 of out-of-pocket payments, makes a total of \$1,548.80. I deduct \$48.80 for the small earnings which she made, leaving \$1,500 as a round amount, and add to it \$500 for pain and suffering and for the increased liability to future nervous breakdown to which she is now subject, making, therefore, a total of \$2,000, for which judgment will be entered against the defendant Vivian Martin with costs. The action against the father is dismissed with costs.

[APPELLATE DIVISION.] *

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May 19.

Street Railway—Injury to Passenger—Sudden Stop of Street-car—Passenger Thrown against Rail and Injured—Evidence—Cause of Stop—Warning by Previous Jarring—Possibility of Findings of Jury—Duty of Men in Charge of Car—Result of Injury—Disease—Medical Testimony—Question for Jury.

The plaintiff, a passenger in a street-car of the defendants, was sitting at the end of a seat where a small brass rod was placed a few inches above the seat-level; the car stopped suddenly with a jerk, and she was thrown against the rod, the lowest part of her spine coming in contact with it. The defendants did not deny that the stop was a sudden one, but said that no warning of it could have been had by previous jarring, because it was found to be due to the fall of a brake-shoe. From the only evidence as to the cause of the violent stop and jerk, it appeared that there was a possibility that if the brake-beam was let down at one end only, the other holding firm, there might and probably would be bumping or jarring—depending somewhat upon the character of the pavement. At the trial of an action for damages for the injuries sustained by the plaintiff, the jury found: (1a.) that the plaintiff was injured as a result of the accident; (1b.) that the disease, arthritis, from which the plaintiff was suffering at the date of the trial, was attributable to the injuries sustained by reason of the accident; (2) that the defendants were guilty of negligence which caused the injury complained of; (3) that such negligence was "that of the car-crew in not ascertaining the cause of the jolting;" (4) that something happened before the accident which suggested that the street-car was unfit to run—"the unusual jolting before the accident."—

Held, that there was some evidence to sustain the 4th finding; and, if there was jolting or bumping before the accident, as the jury found, it was the duty of the defendants' servants in charge of the car to ascertain why the bumping was going on; they made no inquiry, and so neglected the opportunity of ascertaining the cause and preventing the accident.

Held, also, that there was enough in the testimony of the physicians and surgeons who were called at the trial to make it a fair question for the jury whether the injury was the cause of the arthritis, or whether it merely aggravated the disease already existing, or whether the blow and the disease were in any way connected: there was evidence upon which the jury could properly find in favour of the plaintiff.

THE following statement of the facts is taken from the judgment of HODGINS, J.A.:—

Appeal by the defendants from the judgment at the trial before MASTEN, J., and a jury. The action was for damages for negligence causing injury to the plaintiff, a woman of 66 years of age, a finisher of dresses and blouses.

The questions and answers were as follows:—

"Q 1a. Was the plaintiff injured as a result of the accident complained of? A. Yes.

"Q. 1b. Is the disease, i.e., arthritis, from which the plaintiff is now suffering, attributable to the injuries sustained by reason of the accident? A. Yes.

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"Q. 2. Were the defendants guilty of negligence which caused the injury complained of? A. Yes.

"Q. 3. If so, in what did such negligence consist? A. That of the car-crew in not ascertaining the cause of the jolting.

"Q. 4. Did anything happen before the accident which suggested that the street-car was unfit to run? A. Yes, from the unusual jolting before the accident.

"Q. 5. If you answer 'Yes' to the last question, state what it was that so happened. A. Answered in the fourth question.

"Q. 6. If you find the defendants liable, what damages do you assess? A. We award the plaintiff \$1,000."

The trial Judge directed judgment to be entered for the plaintiff for \$1,000 and costs; the defendants appealed.

February 13 and 14. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

D. L. McCarthy, K.C., for the appellants, argued that the evidence of the doctors was in accordance with the view that the arthritis from which the plaintiff suffered preceded the accident. The doctor who made the X-ray examination of the spine said that the shock caused by the sudden stopping of the car could have no effect on the dorsal vertebræ, and that there was nothing abnormal in the condition of the sacrum and coccyx. He was not in a position to say that the condition he found in the plaintiff was caused by the accident. Another doctor said that the plaintiff was suffering from osteo-arthritis, but could not say whether the disease began after the accident, or was an old, infectious case which had lasted for years. The appellants deny that any jarring occurred for which they were responsible, and contend that the answers of the jury to the four last questions do not warrant a finding of negligence against the defendants. The mere possibility that the disease might be aggravated by the shock is not sufficient to fix liability on the defendants.

J. B. Clarke, K.C., for the plaintiff, the respondent, argued that there was ample evidence in the medical testimony to go to the jury, and to justify their finding that the defendants were chargeable with negligence. The plaintiff shews that by the wrongful conduct of the defendants she has received an injury, and the onus is cast on the defendants to shew that the trouble from

which she suffered was not caused by the accident. [HODGINS, J.A., referred to *Mitchell v. Fidelity and Casualty Co. of New York* (1916), 35 O.L.R. 280, 26 D.L.R. 784, 37 O.L.R. 335, 28 D.L.R. 361; *Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A.C. 592, 36 D.L.R. 477.] The evidence of Dr. Coatsworth shews that causes other than the jolt, which might have produced the plaintiff's injuries, are excluded, for he says that there was nothing wrong with her physical condition except the injury to the spine. The evidence shews that, before the accident, the car was acting in such a way as should have attracted the attention of the crew. They did nothing, and that shews negligence on their part.

McCarthy, in reply, argued that the evidence of Dr. Coatsworth shewed that the plaintiff was not, at the time of the accident, the healthy person she is represented to have been: she was full of infection, and was suffering from an advanced arthritis in the upper portion of the spine. The plaintiff has failed to prove that her arthritic condition was the result of the jolting of the car. The findings of the jury are not justified by the evidence, and in any case there is nothing in them on which to found a verdict of negligence against the defendants.

May 19. The judgment of the Court was read by HODGINS, J.A. (after setting out the facts as above):—Mr. McCarthy argued that the answers to questions 3, 4, and 5 do not indicate any actionable negligence; that the respondent called as her witness the appellants' master mechanic, who said that there was nothing to indicate to the appellants that the car was in any way defective and that no possible foresight could have avoided the accident. He also contended that the arthritis from which the respondent was suffering was not due to the injury, or that that point was left in doubt, and so the appellants could not be liable under that head of damage.

In order to appreciate the answers to questions 3, 4, and 5, it is necessary to know the cause of the sudden stoppage which caused the respondent's injury. She was sitting at the end of a seat where a small brass rod was placed a few inches above the seat-level, and against this she was thrown, the lowest part of her spine coming in contact with it. She was dazed by the blow,

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had to sit on the car-step after getting out, was helped to the next car, and finally got home. She had to give up work after several days' trial.

That the stop was a sudden one is not denied, but it is said that no warning of it could be had by jarring, because it was found to be due to the fall of the brake-shoe, the coming down of which on the track in front of the wheel resulted in an immediate cessation of the car's motion, throwing every one about.

There is a brake-shoe on every wheel. Each pair is fastened to a brake-beam, which runs across between and in front of the wheels, about four inches above the pavement. McCrea, the master mechanic, thus explains the result of the fall of the brake-beam, from one end of which a plug, which held it up, had worked out:—

"Q. And the absence of that plug would allow the beam and shoe both to fall down? A. Yes, s'r, at that end.

"Q. Now you say that plug was not there when it came in? What condition was the beam in? A. The beam was bent.

"Q. What was the beam made of? A. Steel.

"Q. A steel beam? A. Yes.

"Q. And you say it was bent? A. Yes, sir.

"Q. In what way? How was it bent? A. Well, it was sprung in itself; that is, it was twisted.

"Q. Sprung and twisted? A. Yes.

"Q. And what condition was the shoe in? A. Well, the shoe was all right. The shoe and head were all right, but the beam had been twisted in its length. The beam goes across between the two wheels going down, and coming in contact with the ground had thrown it back and twisted it, and had bent the beam.

"Q. Had bent the beam? A. Yes.

"Q. What effect would that have upon the car? A. Coming in contact with the pavement would make the car—stop the car immediately. There would not be any bumps ahead of it at all, it would all happen at once; when the beam came down the car would stop. . . .

"Mr. Clarke (for the plaintiff). The end of that beam would be out on the rail? A. It would fall inwards.

"Q. Yes, but it has only a very short distance to fall, hasn't it? A. About $4\frac{1}{2}$ inches.

"Q. That wouldn't bring it in if it held the shoe directly in front of the wheel? A. It wouldn't entirely.

"Q. No, it would strike the track. A. Mostly always the pavement is higher than the track, so it strikes the pavement before it strikes the rail.

"Q. Well, with that end down, would you say that was so? A. Yes.

"Q. With the far end bound up, and that downwards, that it would strike the pavement first? A. Yes, sir.

"Q. You think it would? A. Yes, sir.

"Q. If this beam fell down, as no doubt the evidence shews it did, at one end, would that be dangerous to drag the car along—for the motorman to continue to pull it along after it fell down? A. Well, I don't know if he could.

"Q. Yes, assuming that he could? A. Yes, assuming that he could, yes, it would be.

"Q. Assuming that the motive power would drag it along? A. I cannot assume that it would happen, under the circumstances.

"Q. Well, but answer this question. If the motive power was sufficient to drag the car along, with the one end of that beam down, would that be a dangerous thing to do? A. Yes, sir, if it were possible."

On examination he maintained that with the plug out the beam would fall and would stop the car instantly.

On re-examination he was asked about the steel band that went around the ends, which he said did not come in contact with the pavement, and then the questions and answers go on thus:—

"Q. No; but the brake-beams might, from what you say? A. The bottom of the brake-shoe might.

"Q. And they would be running on that class of street for a month. Well, suppose now that one of these bands that are around this had broken; what effect would that have? Wouldn't it let it down part way? A. No, the other would still have held it up.

"Q. Yes, but there was some latitude; might it not drag a little? A. Yes, might.

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"Q. Might let it down an inch or two? A. Yes, if one of the hangers broke, the other would have to carry double weight, and double the work.

"Q. And that would allow it to hang down lower? A. Yes.

"Q. How much—three or four inches? A. No, it wouldn't go down four inches, because then the shoe would be running on the pavement all the time; it would have to happen very sudden.

"Q. It would be rubbing on the rail all the time? A. Yes; in our case generally the pavement.

"Q. Well, they are supposed to be above the rail. A. Yes, but the rail is below.

"Q. It operates on the same part of the wheel as it runs on? A. Yes.

"Q. And, if one of those got out of position and let it down, the point of it might be catching in between the wheel and the rail? A. Yes, if the rail was above the pavement.

"Q. Now, if that bolt there got out in a mysterious way that no other bolt has got out, might it not have been some break that you do not suggest here, that you cannot tell, practically, how one of these pins that— A. Yes, the pin broke, and this hanger socket twisted enough to let that down below the truck-frame—it might come out.

"Q. And it might hold on for a considerable time before it came out all the way? A. It might take some time."

At the close of his examination, the learned trial Judge asked him these questions:—

"His Lordship: Would it be possible that this antecedent bumping that has been described by some of the witnesses would arise from some bending, or from partially breaking the pin, and the shoe getting down, not all the way down solid? A. It would be possible, yes.

"Q. That would be a theory? A. Yes, yes, sir, it is a sound theory too."

From this, the only evidence as to the cause of the violent stoppage of the car and the consequent jerk, it would appear that there was a possibility that if the brake-beam was let down at one end only, the other holding firm, there might and probably would be a period of time when there would be bumping or jarring, depending somewhat upon the character of the pavement, i.e.,

whether it was level or the blocks had heaved up. There was, therefore, some evidence upon which the jury might find their answer to Q. 4. If the possibility spoken of by Mr. McCrea existed, and he never puts it higher than that, the duty of the servants of the company was clear, i.e., to ascertain why the bumping was going on: *St. Denis v. Eastern Ontario Live Stock and Poultry Association* (1916), 36 O.L.R. 640, 30 D.L.R. 647. There is, I admit, but slight evidence here to support the possibility, that given by the master mechanic, while his expert knowledge is not shewn to be possessed by either the motorman or conductor. But want of sufficient information in the subordinate officers is not a reason for absolving the company, who are, in law, charged with responsibility for conditions which may exist or happen. Assuming, as the jury have, that there was continuous bumping or jarring, inquiry should have been made at the time by those in charge, and I do not consider, as a sufficient excuse, the fact that bumping may be occasioned on the streets of Toronto by causes not in themselves involving danger. The absence of an inquiry at all by the motorman and conductor prevents the company from relying on their want of information. Both motorman and conductor say they did not notice anything unusual. It may be that the things mentioned by the master mechanic, viz., skidding, bad rail-joints, uneven scoria blocks, are so frequently the cause of bumping or jarring that their senses had been dulled to them, or they may have regarded them as matters of course. In either case they took it for granted that things were all right, and thus neglected the opportunity afforded them of ascertaining the cause and preventing the accident. I think the jury were entitled to come to this conclusion.

Arthritis as an element in the damages depends upon the evidence of two doctors, Richards and Starr, both eminent in their profession. The other physicians only throw side lights upon the case. If these two differed, there was evidence for the jury to weigh and decide upon.

Dr. Richards says that one blow such as the respondent got, might, if the whole of the spine was wrenched, produce the arthritis shewn on the skiagraphs, but cannot say positively that it was so caused. An injury at the point of the spine, in itself alone, he says, could scarcely be held responsible for the changes higher

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up in the spine (shewn on the plates), but he thinks it is possible to receive a very severe injury to the whole of the spine by sitting down and coming in contact with the brass rail, as the respondent said she did, without any wrenching of the spine. He also testifies that the development of arthritis is a very common occurrence in consequence of receiving such an injury, in a person past middle life. The conditions evidenced by the plates, he considered, could be produced in nine months. He knew of one such case. Dr. Starr, *contra*, was of the opinion that, judging from what the plates disclosed and from his clinical examination, the arthritis was older than nine months, a matter of years, and was osteo-arthritis, a late stage of infectious arthritis. He also deposed that, in his opinion, one blow could not cause arthritis, but might aggravate it if the patient had it previously. On examination he rather hesitates to pledge himself to a positive opinion—thus:—

“Q. Do you tell the jury that it was more advanced than could take place in nine months; that her case was further advanced; and that the arthritis had arrived at a condition that could not have originated so recently as the date of the accident? A. Oh! no, I wouldn’t like to say that.

“Q. No, I thought you could hardly say that.

“Q. So it might have arisen, from all you can say, it might have commenced, after the date of the accident? A. It might have, but not likely.

“Q. But not likely, you say? A. No.

“Q. And that is as far as you can say about the duration of this woman’s case; therefore your evidence which you give to the jury is that the arthritis may or may not have arisen after this injury to her; that is a fair deduction from what you have said? A. No, it isn’t a fair deduction.

“Q. Well, what is? A. You are asking a hypothetical question, if it is possible that the changes in the X-ray plate could have taken place within a series of months. I say in my experience it is not likely, but I would not like to say that it cannot happen, because I have seen things that look almost impossible happen, but it is not likely.

“Q. I did not ask you if it was not likely. I will put you back where you put yourself. You cannot say positively that it did not commence subsequent to the action? A. No, that is right.”

The history of the case, as disclosed by the professional evidence, may be mentioned.

Dr. Coatsworth, sent by the appellants, examined the respondent on the 20th September, 1917, about a week after the accident. He found her complaining of tenderness at the lower end of the spine, which he took to mean the coccyx. She said she suffered pain then; and, at a later visit on the 25th September, he understood it occurred when she walked. He says the blow did not hurt her "except in her mind." On the 25th February, 1918, Dr. A. J. Johnson, consulting physician of the appellants, examined the respondent. She then complained of a tender spot on the lower tubicle of the sacrum, just above the coccyx, but not in the coccyx. This resulted in pain in walking and sweeping. He did not examine the rest of the spine.

In June, 1918, Dr. Richards examined her and took X-ray photographs of the spine. He noticed tenderness at certain joints of the spine. Dr. Robertson, sent by the appellants, examined the respondent, but does not state when he did so. He says that an injury may be the primary cause of arthritis and that a bad wrench of the knees would produce osteo-arthritis in four or five months, but cannot say what the effect of the particular blow suffered by the respondent would be. He thinks the skiagraphs indicate a condition which would not be produced in the time which elapsed between the blow and the time he saw the X-ray plates, and that the arthritis preceded the injury. Dr. Starr examined the respondent in August, 1918, and found her suffering from an indefinite series of pains up and down the spine. The coccyx was not painful. All this testimony points to a progressive condition—the pain creeping upwards and persisting.

Dr. Richards admits that the respondent had osteo-arthritis. But he and Dr. Starr differ both as to the ability of one such blow to cause the condition described and also as to the length of time necessary to produce those conditions.

There is quite enough in the evidence I have quoted to make it a fair question for the jury whether the injury was the cause of the arthritis, or whether it merely aggravated the disease, and indeed whether the blow and the disease were in any way connected.

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It was argued that there was no such connection, and that the medical evidence raised no doubt at all. I am unable to agree in this. The jury have found in favour of the respondent; and there was, in my opinion, evidence on which they could properly so find.

Upon the whole case I think the appeal fails and should be dismissed.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

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Will—Construction—Direction to Executors to “Pay off the Mortgage upon my Real Estate” out of Specified Part of Estate—Mortgage Existing when Will Made Paid off by Testator and New Mortgage for Lesser Amount and to a Different Person Substituted—Will Speaking from Immediately before Death—“Contrary Intention”—Wills Act, sec. 27 (1)—Division of Estate into Parts—One Part to be “\$5,000 less than the other three Parts”—Meaning of.

The testator devised and bequeathed all his estate, both real and personal, to his executors upon trust: “first, to convert the same into cash and the proceeds thereof to divide into four parts so that three of such parts shall be equal and the fourth shall be \$5,000 less than the other three parts; secondly, to pay off the mortgage upon my real estate in the town of P. out of the said fourth part and should the same not be sufficient for that purpose then the deficiency shall be taken equally from the other three parts and should the said fourth part prove more than sufficient to discharge said mortgage then upon trust to pay the surplus of such part to my son J.” The will was executed in 1905; the testator died in 1912. At the date of the will there was a mortgage upon the real estate of the testator in the town of P. for \$4,233.33 made to M. This was paid off by the testator and discharged; he obtained the money therefor partly from a new mortgage upon the same land for \$3,600 made to S., upon which the testator made payments in 1910 and 1911; at the time of his death it stood at \$3,000 and interest:—

Held, that sec. 27 (1) of the Wills Act, R.S.O. 1914, ch. 120, was to be applied: no clear intention to exclude the later mortgage appearing by the will, it spoke and took effect as if it had been executed immediately before the death of the testator; and the amount of that mortgage was declared a charge upon the fourth part of the estate.

Review of the authorities.

Held, also, that the estate was to be divided into four parts, of which the fourth part was to be \$5,000 less than *each* of the other three parts.

AN appeal on behalf of all persons other than James E. Thompson interested in the estate of James Thompson, deceased, and a cross-appeal by James E. Thompson, from an order of LATCHFORD, J., in the Weekly Court, Ottawa, declaring the construction of the will of the deceased in respect to a charge and the amount of a legacy.

The following statement is taken from the judgment of HODGINS, J.A.:—

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Only two points arise, on a portion of the will of the late James Thompson, as follows:—

“In the first place: I give devise and bequeath all my estate both real and personal unto my executors hereinafter named under the following trusts namely: first, to convert the same into cash and the proceeds thereof to divide into four parts so that three of such parts shall be equal and the fourth part shall be five thousand dollars less than the other three parts; secondly, to pay off the mortgage upon my real estate in the town of Perth out of the said fourth part and should the same not be sufficient for that purpose then the deficiency shall be taken equally from the other three parts and should the said fourth part prove more than sufficient to discharge said mortgage then upon trust to pay the surplus of such part to my son James.”

The will is dated the 30th January, 1905, and there are three codicils in 1905 and 1908, not directly affecting these appeals. The testator died on the 28th October, 1912. At the date of the will a mortgage existed upon the real estate of the testator in Perth for \$4,233.33 to the Mohr executors. This mortgage was afterwards paid off and discharged, the testator obtaining the money therefor partly from a new mortgage for \$3,600 upon the same lands to one Spence, and partly from his own resources. Upon this last mentioned mortgage the testator paid \$300 in 1910 and 1911, and at the time of his death it stood at \$3,000 and interest. It has since been paid off by his executors.

The appellants in the main appeal contend that the present mortgage is to be deducted. The cross-appeal is directed to the division of the estate.

March 10. The appeal and cross-appeal were heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

W. N. Tilley, K.C., and C. J. Foy, for the appellants, referred to sec. 27 (1) of the Wills Act, and argued that it applied to the case, and that the amount of the Spence mortgage should be deducted from the respondent's share of the estate. They cited *Re Ashburnham* (1912), 107 L.T.R. 601; *In re Ord* (1879), 12 Ch. D. 22; and pointed out that *Sidney v. Sidney* (1873), L.R. 17

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Eq. 65, which was the strongest case against the appellants, followed the old case of *Smallman v. Goolden* (1787), 1 Cox Eq. 329, which is distinguished in *Everett v. Everett* (1877), 7 Ch.D. 428, at p. 432: see collection of cases in Snider's Annotations to R.S.O. 1914, pp. 409-411.

R. McKay, K.C., and *R. J. Slattery*, for James E. Thompson, the respondent and cross-appellant, argued that the learned Judge below was right in holding that the Spence mortgage should not be charged against their client's share of the estate. The will was made in 1905, and the circumstances shewed that the testator had in mind the mortgage existing at that date upon his real estate in the town of Perth. That was the mortgage specifically referred to in his will. As to the cross-appeal, the will should be construed as directing that James E. Thompson's share should be less by \$5,000 than the other three shares added together.

Tilley, in reply.

May 19. The judgment of the Court was read by HODGINS, J.A. (after stating the facts as above):—My brother Latchford has held that the later mortgage cannot be charged against the James E. Thompson share in the estate. He has also decided that the estate is to be divided into four parts, of which the fourth part devised to the son James E. Thompson is to be \$5,000 less than each of the other parts.

The view of the learned Judge was that, in reference to the first question, sec. 27, sub-sec. 1, of the Wills Act, R.S.O. 1914, ch. 120, did not apply. That sub-section is as follows:—

“Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.”

There is nothing to prevent the application of that sub-section to the clause in question, unless it be the fact that, when the will was drawn, there was a mortgage existing upon the real estate of the testator which has since been discharged, though actually replaced by the present one.

The fact that property existed at the date of the will which is specifically described and clearly identified has been held sufficient to prevent the application of the provision of the Wills

Act just quoted, if it is clear that reference is made to that property and that property alone. That is upon the principle that the Wills Act does not necessarily draw within its terms property obviously not intended to be so treated, if regard is had to the whole of the will itself. It is really a canon of construction which necessitates reference to the real wishes of the testator, as embodied in the will, in the effort to determine whether a contrary intention has been expressed.

Lord Hatherley, when Sir W. Page Wood, V.-C., in considering the effect of this particular section, then recently passed, says in *Douglas v. Douglas* (1854), Kay 400, at pp. 404, 405:—

“In *Cole v. Scott* (1849), 1 Mac. & G. 518, Lord Cottenham says, what every one must agree in thinking correct, that the intention of the testator is not to be altered; and if it be clear that the testator is not referring to a general class of property, but to something specific, the new statute is not to have the operation of passing property which evidently was not in the contemplation of the testator, where the subject of the gift appears to have been defined and marked out by him as existing at the period when he is speaking. I can imagine that, under the new statute, a gift of ‘all my stock’ would pass all stock to which the testator was entitled at the time of his death. But suppose the bequest were of ‘all my stock which I have purchased,’ that would make a considerable difference, and would, I think, be enough on the face of the will to shew that the testator was defining the particular portion of property which he intended to give, as being property then in his possession; so, if the gift were of ‘all the debts due to me on judgments,’ it is possible that judgments obtained after the date of the will would pass; but if it were ‘all judgments which I have registered,’ that would be taking a particular class of judgments out of the general class, and would shew that the testator did not intend his will to have the sweeping operation of passing all judgment debts registered by the testator at the time of his death.”

In *Goodlad v. Burnett* (1855), 1 K. & J. 341, he pointed out that the contrary intention could not be inferred from an expression equally applicable to the state of things at the date of the will and at the time of death, because the testator might well have used the language appealed to for the very purpose of passing the property as it existed at the later date.

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In *In re Gibson* (1866), L.R. 2 Eq. 669, he says (p. 672):—

“I adhere to the opinion that I have before expressed as to the application of sec. 24 of the Wills Act, that when you find a mere specific thing, incapable of increase or diminution, in existence at the date of the will, but not in existence at the time of the testator’s death, there is sufficient indication upon the will of the ‘contrary intention’ to which sec. 24 refers, to prevent the operation of the rule which makes the will speak from the death of the testator. . . . When there is a clearly indicated intention upon the face of the will to give the single specific thing, and nothing else, it would be a very narrow construction of the words of sec. 24 to hold that you must sweep in everything to which the words might be held to apply, without the slightest reference to the state of things existing at the date of the will.”

And again (p. 673):—

“I adhere to my view, that where there is a distinct reference to a distinct and specific thing, and not to a *genus*, there is sufficient indication of a ‘contrary intention’ to exclude the operation of the rule established by the 24th section of the Wills Act, and limit the operation of the will to the state of things existing at the date of the will. In this case the testator, at the time of his death, had not this specific stock in any shape. He had parted with it, and acquired by subsequent purchase a much larger number of shares. These subsequent purchases were not in any shape a replacing of the original fund, and there is nothing to lead the Court to suppose that, having once adeemed the specific bequest, the testator has replaced the identical thing. He has distinctly referred to one thing in his will, which was no longer in existence at the time of his death. That thing, and that only, can be considered as the subject of the bequest.”

In these cases regard must be had to the limitations asserted, as they indicate to my mind the principle on which this case should be decided. In the earlier one the limitation is found in the words “defined and marked out by” the testator as existing at the period when he is speaking, and is illustrated by what follows in the judgment, i.e., that where the general expression is controlled it must be by some reference to that period, e.g., “which I have purchased” or “which I have registered.”

This is equally clear from the later judgment. The learned Judge points out that the specific thing he refers to is one “incap-

able of increase or diminution," and must be distinct and specific and not one of a *genus*. So that, if what is referred to is in one sense specific, yet is of a character which may increase or diminish, or is of a certain *genus* of which there may be more than one kind, the statutory presumption cannot be defeated because the thing is in a narrow sense specific.

This distinction runs through the cases I have consulted, and was in Mr. Justice Riddell's mind when, referring to a bequest of money to be paid out of an account in the Post Office Savings Bank which the testator had transferred to the Molsons Bank, he says in *Re Atkins* (1912), 21 O.W.R. 238, 240, 3 O.W.N. 665, 667, 3 D.L.R. 180:—

"There is nothing in this will indicating any such contrary intention—the testator retained the power of increasing or diminishing the amount on deposit, and must be taken to have understood that it was the fund so increased or diminished upon which this clause of his will would take effect."

Lord Hatherley's opinion was approved by Boyd, C., in *Morrison v. Morrison* (1885), 9 O.R. 223, 10 O.R. 303. In *Hatton v. Bertram* (1887), 13 O.R. 766, the words "which I now reside upon" were held not sufficiently specific to exclude from the devise of the homestead known as "Walkerfield" the additions thereto made after the date of the will.

In *In re Holden* (1903), 5 O.L.R. 156, Meredith, C.J. (now C.J.O.), speaking of the rule in question, remarks upon the quality of the subject-matter (stock in trade) and its fluctuating nature thus (p. 159):—

"It is, in the first place, I think, highly improbable, having regard to the subject-matter of the gift, that the testator intended to limit it to the stock in trade and book-debts belonging to him at the date of the will. It was a gift of something the constituents of which were changing from day to day and even from hour to hour, and the same reasons which led to the decisions to which I have referred as to the effect of the new law on bequests of that which is generic, seem to me to apply in some degree at least to prevent, if it can be avoided, such effect from being given to the word 'now' in this case as would limit the gift to the very stock in trade and book-debts which belonged to the testator at the time when he made his will."

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In *In re Portal and Lamb* (1885), 30 Ch. D. 50, Cotton, L.J., indicates that the words used, which may restrict the devise to the date of the will, must "aptly describe or apply to it" and must not be such as to be capable of including after-acquired additions; while in *Re Ashburnham*, 107 L.T.R. 601, Swinfen Eady, J., says it requires "distinct words" to shew that after-acquired property is not to pass.

In *Cave v. Harris* (1887), 57 L.T.R. 768, Kekewich, J., adopts Lord Hatherley's view of the Wills Act, and quotes, also with approval, what was said in *Dickinson v. Dickinson* (1878), 9 Ch. D. 667, 672: "I prefer the principle indicated by Hall, V.-C., in *Dickinson v. Dickinson* (*ubi sup.*), where he says (9 Ch. D. 672): 'There are no words . . . which limit the property there to that which he possessed at the date of the will,' shewing that, in his opinion, what you want are words which limit the devised property to that which is in question, to that which he held at the date of the will, rather than words which exclude something purchased afterwards."

In *In re Evans*, [1909] 1 Ch. 784, the decision of Joyce, J., is in line with the other judgments quoted.

In Halsbury's Laws of England, vol. 28, p. 692, the result of the decisions is well summed up thus:—

"In a case, therefore, where the thing given is generic, and may increase, diminish, or otherwise change during the testator's life, so that the description may from time to time apply to different amounts of property of like nature or to different objects, then the effect of the presumption, if applicable, is that the property answering the description at the death of the testator passes under the gift."

In this instance, if I read the foregoing cases aright, the words, "the mortgage upon my real estate," while in one sense describing the charge then existing, convey nothing in themselves clearly excluding another mortgage if substituted for it. The expression can be as appropriately and accurately applied to the mortgage *in esse* at the testator's death as to the incumbrance at the time he made his will. Nothing compels the conclusion that he intended that mortgage and that mortgage alone to be paid off. The word "mortgage" is equivalent to and means "debt secured by mortgage," and is generic in the same sense as the words "stock of

goods." It may represent a charge then existing or the later one that replaced it, just as the more general expression can include the changed contents of a store. The debt it represents and secures may decrease by payment or may exist notwithstanding the discharge of the particular security. It is a valid charge on the real estate at the time of death, although the charge is held by a different mortgagee; it is within the expression used by the testator. Meredith, C.J. (now C.J.O.), so decided as to stock in trade in *In re Holden*, ante, and I can see no difference in principle when the word "mortgage," interpreted as "debt secured by mortgage," has to be dealt with. Each may include a substitute or substitutes; and, while one carries the idea of amplification or diminution, the other is equally descriptive of a larger or smaller charge held by the same or by a different mortgagee. I can see no reason why the statute should not be applied and this expression treated as meaning the mortgage in existence at the testator's death. There is nothing indicating a contrary intention, and certainly nothing in the words used which requires the Court to hold that the testator's intention was to limit them so as to exclude any mortgage or charge which remained outstanding at his death upon his real estate. Indeed the direction to pay it out of a specific fund which was to come into being only after his death indicates that he contemplated the existence of the mortgage to be discharged as continuing or as being a charge on his real estate at that time.

As to the cross-appeal, enough was said on the argument to indicate that no other conclusion than that reached by Latchford, J., was possible.

The appeal should be allowed and the cross-appeal dismissed, both with costs.

Order accordingly.

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[APPELLATE DIVISION.]

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May 19.

Railway—Injury by Engine of Train to Person about to Cross Track—Crossing of two Railways at Rail-level—Negligence—Findings of Jury—Evidence—Duty to Stop before Reaching Crossing—Railway Act, R.S.C. 1906, ch. 37, secs. 277, 278—Train Approaching Wreck Zone—Duty to Proceed with Caution—Speed of Train.

The plaintiff, an experienced railwayman, at 5 o'clock in the morning of a December day, attempted to cross the track of the defendants, when he was struck by the locomotive of a passenger train going west, and was injured. On the previous day a train had been wrecked at a level crossing of the defendants' lines with those of another company; the plaintiff had been engaged in clearing the track of the wreckage, and was about to cross the track at or near the place of the wreck, when he was struck. At the trial of an action for damages for the plaintiff's injuries, the jury found that that there was negligence which caused the injuries, and that such negligence was "in not stopping at a reasonable distance east of the distant signal and proceeding with sufficient caution approaching wreck zone which was observed." They also negated contributory negligence, and assessed the plaintiff's damages at \$3,000. The crossing had no interlocking switch system. The "distant signal" or distance semaphore at which a train approaching this crossing from the east should come to a full stop was 700 feet east of the crossing:—

Held, that there was evidence to sustain the findings of the jury, and the plaintiff was entitled to judgment.

Sections 277 and 278 of the Railway Act, R.S.C. 1906, ch. 37, were applicable to this crossing; there was a breach of the statutory duty to stop before reaching the crossing of two railways (HODGINS, J.A., expressing no opinion as to this).

The finding by the jury of negligence in not "proceeding with sufficient caution approaching wreck zone" was covered by the allegation of "excessive speed" made in the plaintiff's pleading; and "excessive speed" would be such speed as would be excessive in all the circumstances of the case—the unusual circumstances of the wreckage, additional lights, etc., were all to be taken into account.

The jury had the right to pass upon the question of excessive speed.

Minor v. Grand Trunk R.W. Co. (1917), 38 O.L.R. 646, explained and distinguished.

Columbia Bitulithic Limited v. British Columbia Electric R.W. Co. (1917), 55 Can. S.C.R. 1, 34, and *Orth v. Hamilton Grimsby and Beamsville Electric R.W. Co.* (1918), 43 O.L.R. 137, referred to.

ACTION for damages for injuries sustained by the plaintiff by reason of an engine of the defendants running him down. He alleged negligence on the part of the defendants.

The action was tried by BRITTON, J., and a jury, at Welland.
G. H. Pettit, for the plaintiff.

R. S. Robertson, for the defendants.

November 20, 1918. BRITTON, J.:—The negligence complained of is driving the train at too great speed, and the train not stopping

before attempting to pass over a level crossing, where the interlocking system did not prevail.

The plaintiff was a married man, living at Bridgeburg, and was employed by the Michigan Central Railroad Company as section foreman.

On the 20th December, 1916, the plaintiff was sent with other men to clear away some wreckage caused by an accident at or near Niagara Junction. Early on the morning of the 21st December, he had finished his work and had crossed the track to put away his tools in a cabin. He had been working strenuously about 24 hours, and was doubtless going home for his breakfast and for a rest. Having put away his tools, he discovered that his lantern had been left behind, and he crossed the Wabash track to get it; and, having done what he wished with it, he desired to recross the track to go home. On coming out of the building, before recrossing the track, he looked eastward down the track to see if any train was coming in his direction. He would not say that he looked more than once, but he did look once carefully. He was an experienced railroad man, and knew the attendant dangers to the lives of men doing such work on or near the tracks. Having looked down the track and having seen nothing approaching where he was, he stepped forward and was struck by a heavy passenger train that rushed by him, causing the injuries of which the plaintiff complains. The engine-driver did not at the time know that an accident had occurred. The Wabash train going west had received notice that the track was clear, so there could have been no complaint that the engine-driver was wrongfully moving his train. This action is brought for the injuries to the plaintiff then received.

At the close of the trial of the plaintiff's case, the counsel for the defendants asked for a dismissal of the action, on the ground that, upon the whole evidence which had then been given, no actionable negligence had been shewn. I thought it better to reserve my opinion and to allow the jury to deal with it, subject to my decision.

I am of the opinion that the motion must prevail.

The jury found that there was negligence which caused the injuries to the plaintiff, and that such negligence was "in not stopping at a reasonable distance east of the distant signal and proceeding with sufficient caution approaching wreck zone which was observed," and that there was no contributory negligence by the plaintiff, and assessed the damages at \$3,000.

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I am of opinion that the accident to the plaintiff was a mere accident, for which the defendants were not responsible, and that there was no evidence that could be properly submitted to the jury to establish liability on the part of the defendants.

I think there was no evidence of such an excessive rate of speed at the time the accident occurred as occasioned injury to the plaintiff. The failure to stop, if it occurred, was at a place considerably east of the spot where the plaintiff was injured.

The negligence in not proceeding with sufficient care when approaching "the wreck zone" was not such negligence as was complained of by the plaintiff.

Just how the accident happened was best told by the plaintiff himself, who fortunately was not killed.

The plaintiff's evidence, taken from the reporter's notes, is in part as follows:—

"Q. That train was very close to you when you looked, wasn't it? A. Yes.

"Q. With a bright head-light shining? A. Yes.

"Q. And you didn't see it, you say? A. No.

"Q. You never saw it? A. I didn't see it.

"Q. There was nothing between you and that train? A. Not then.

"Q. And you want us to believe that you were wide awake, and in full possession of your faculties, you, an experienced railway man, stepped out with a train coming head-on towards you, and you didn't see it? A. I didn't see it.

"Q. Might as well not have had a head-light as far as you were concerned? A. It wouldn't have made much difference.

"Q. There it was, with a bright head-light coming right down on you, you were 7 or 8 feet away from this track; you looked up and didn't see the train? A. No, sir.

"Q. And you cannot explain it? A. No, I cannot.

"Q. You don't know why it was you didn't see it? A. Any more than those lights bothered me.

"Q. You were asked in your examination if you could explain it, and you said you could not? A. No, I can't explain it.

"Q. How do you account for the fact that you did not see the train? A. I cannot tell you that. I don't know why.

"Q. That is what you swore to before. You don't know why it was you didn't see that train? A. I don't know.

"Q. Then until you started to cross the track, of course there was absolutely nothing in the way of the Wabash train going right through? A. They had a clear road.

"Q. And nobody would know that you were going to cross until you actually started to cross? A. No.

"Q. So that the engineer of the Wabash train would have no opportunity of doing anything to stop his train after you started out? A. He should have been stopped.

"Q. That is not what you are asked, and perhaps the jury will decide the case—I say when you started out to cross the tracks, it was absolutely impossible for the Wabash engineer to do anything? A. Certainly.

"Q. In fact, he would be on the north side of his train? A. Yes, sir.

"Q. And he would not even see you? It is a question whether he would or not? A. Yes, it is a question. I was on the north side when I was struck.

"Q. I know, but you just popped out there as the engine hit you? A. Yes.

"Q. So it would be absolutely impossible for him to do anything after you appeared from behind the car? A. Yes.

"Q. And you venture a suggestion that he should have stopped? A. Yes.

"Q. And you know, as a matter of fact, that that is not the stopping place for this train, is it? A. They all got to stop there.

"Q. They don't stop there. You say they have got to, but they don't, do they? A. No, I know they don't.

"Q. The stopping place that is used for trains crossing there is back at the distant semaphore, isn't it? A. I should think so.

"Q. You know it, don't you? A. Yes.

"Q. And you knew it at the time? A. Yes.

"Q. You knew that perfectly well then, just as you know it to-day? A. Yes.

"Q. You venture some legal opinion that they should have stopped somewhere else? A. No, I know nothing about the legal opinion at all.

"Q. That is where the trains had been always in the habit of stopping, and that is where you knew they did, and you didn't expect there would be any train stop at this crossing that night?"

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This evidence seems to me to bring the case quite within the case of *Hanna v. Canadian Pacific R.W. Co.* (1908), 11 O.W.R. 1069; see the last paragraph but one on p. 1074. In this present case there was no evidence in support of the plaintiff's claim that could properly be submitted to the jury.

As above stated, I must give effect to the defendants' motion for a dismissal of the action.

Action dismissed.

The plaintiff appealed from the judgment of BRITTON, J.

February 27 and 28, 1919. The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

W. N. Tilley, K.C., for the appellant. Sections 277 and 278 of the Railway Act are applicable. There is no question of an interlocking system here; and, though the semaphore shewed the line clear, under the statute the locomotive should have come to a full stop, before reaching this crossing of the lines. Such stopping should be within a reasonable distance of the point of crossing, and the jury have found that not doing so was negligence, for the consequences of which the defendants are liable to the plaintiff. The engine-driver should have proceeded more slowly and not allowed his engine to drift along with the exhaust cut off, as he did. He did not, after observing the wreck zone, proceed with sufficient care, a point that has been found against the defendants by the jury. *Grand Trunk R.W. Co. v. McKay* (1903), 34 Can. S.C.R. 81. is distinguishable. He cited *Columbia Bitulithic Limited v. British Columbia Electric R.W. Co.* (1917), 55 Can. S.C.R. 1, 37 D.L.R. 64 (following *British Columbia Electric R.W. Co. v. Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4), *per* Fitzpatrick, C.J.C., at p. 3, Duff, J., at p. 11, and Anglin, J., at p. 31; *Rex v. Broad*, [1915] A.C. 1110, *per* Lord Sumner, at p. 1113. It is a case of a particular danger, which was noticeable, and actually noticed. The jury were entitled to say that the train did not stop at a reasonable distance east of the signal. In fact, it appears that the train did not stop at all, and the jury might assume that it did not stop. The object of the legislation is to take speed entirely off the train, and to put it altogether under control. [HODGINS, J.A., referred to *Bell v.*

Grand Trunk R.W. Co. (1913), 48 Can. S.C.R. 561, 15 D.L.R. 874.] That case applies by analogy to the case at bar. Even apart from the statute, the defendants were under an obligation to take great care in approaching the wreck, and the finding of the jury was justified. [HODGINS, J.A., referred to *Gowland v. Hamilton Grimsby and Beamsville Electric R.W. Co.* (1915), 33 O.L.R. 372, 24 D.L.R. 49.]

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R. S. Robertson, for the respondents, the defendants, argued that it was incumbent on the appellant to prove some negligent act on the part of the respondents, and to connect such act with the accident. The appellant had nothing in his mind about the Wabash train, and was not deceived or lured in any way. The approaching train was in perfect view from where the appellant stood, there was no reason why he should not see it, and he cannot explain why he did not see it. It is not a matter of speed at all; the speed of the train had nothing to do with the accident. It is submitted that nothing which the respondents did was the cause of the accident, and the matters found against them were not connected with the accident in any causal way. A train like this is absolutely dependent upon signals, and the defendants had a right to assume that persons near by would observe the signals. The respondents' driver had a signal for a clear road. The judicial dicta in the *Columbia* case, *supra*, relied on by the appellant, were not necessary to the decision. The *McKay* case, *supra*, was followed in *Minor v. Grand Trunk R.W. Co.* (1917), 38 O.L.R. 646, 35 D.L.R. 106; Reference was also made to *Grand Trunk Railway v. McAlpine*, [1913] A.C. 838, 13 D.L.R. 618; *Wabash R.R. Co. v. McKay* (1908), 40 Can. S.C.R. 251. None of the things found by the jury was the *causa causans* of the accident.

Tilley, in reply.

May 19. MACLAREN, J.A.:—The plaintiff appeals from a judgment of Britton, J., of the 20th November, 1918, dismissing the plaintiff's action brought to recover damages for his having been struck and severely and permanently injured by the locomotive of a Wabash passenger train, running westward from Bridgeburg to St. Thomas on the Grand Trunk track.

At the close of the plaintiff's case a motion for a nonsuit was made. The trial Judge reserved his decision on this application,

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and the trial proceeded. The jury answered the questions submitted in favour of the plaintiff, and assessed the damages at \$3,000. The Judge, however, subsequently held that the evidence did not disclose any actionable negligence on the part of the railway company, and granted the motion for the dismissal of the action.

The plaintiff was a section-foreman of the Michigan Central Railroad Company, and on the morning of the 20th December, 1916, was sent with four section-men to clear the track of a train which had been wrecked at a crossing of the Grand Trunk track two miles west of Bridgeburg, known as the Niagara Junction. About 5 o'clock the next morning the track had been cleared, and the men were preparing to leave. The plaintiff crossed the Grand Trunk track to get a lantern he had left in a small building called "H. office" on the plan, about 10 feet south of the track. As he was returning, he says, he looked carefully to see if any train was approaching, and, seeing none, he started to cross, and, when nearly across, just as he was stepping over the north rail, he was struck by the locomotive of the Wabash passenger train going west, and hurled some 10 or 12 feet in a north-westerly direction, receiving very serious injuries.

The negligence of the railway company found by the jury was "in not stopping at a reasonable distance east of the distant signal and proceeding with sufficient caution approaching wreck zone which was observed." They also found that the plaintiff could not, by the exercise of reasonable care, have avoided the accident.

The provisions of the Railway Act, R.S.C. 1906, ch. 37, relating to this crossing, are contained in secs. 277 and 278, the material parts of which read as follows:—

"277. No train or engine or electric car shall pass over any crossing where two lines of railway, or the main tracks of any branch lines, cross each other at rail level, whether they are owned by different companies or the same company, until a proper signal has been received by the conductor or engineer in charge of such train or engine or from a competent person or watchman in charge of such crossing that the way is clear . . .

"278. Every engine, train or electric car shall, before it passes over any such crossing as in the last preceding section mentioned, be brought to a full stop" (with a proviso that when a crossing has an interlocking switch system, trains may be relieved by the

Board from coming to a full stop, on receiving the proper signals).

There was no interlocking system at this crossing, so that the foregoing provision as to always coming to a full stop before crossing was applicable to it.

The distance semaphore (called in the evidence the "distant" semaphore or signal) at which a train approaching this crossing from the east should come to a full stop, according to the decision of the Supreme Court in *Wabash R.R. Co. v. McKay* (1908), 40 Can. S.C.R. 251, at p. 354, was 700 feet east of this crossing.

Thomas Hughes, a railwayman, an independent witness, who was on a platform near the top of the tower of the home semaphore or signal, 35 feet above the ground, saw the train in question coming when it whistled in the cut, 1,900 feet east of the diamond crossing, and watched it until it crossed the diamond, and he swears positively that it did not stop during that period.

Thomas Kennedy, a railway conductor, also an independent witness, was up in the tower of the home semaphore, and heard the whistle in the cut. He watched the train until it passed the diamond crossing, which it did, he says, at the rate of 18 or 20 miles an hour. He also swears that it did not come to a full stop between these two points.

Albert Jones, a locomotive engineer, who saw the accident, says that the train crossed the diamond going at the rate of 20 or 25 miles an hour.

Knight, the engine-driver of the Wabash train, said that he had come to a full stop; but his evidence at the trial differed widely from his examination for discovery; and, besides, his statements at the trial were also very conflicting in themselves. He said in his examination for discovery (Q. 50) that he stopped "between 150 and 200 yards from the diamond." At the trial he said to the company's counsel that he stopped 500 feet east of the distance semaphore, which the plan shews to be 700 feet east of the diamond crossing, making the distance from the stop to the diamond crossing to be 1,200 feet, instead of the 150 or 200 yards he had previously sworn to in his examination for discovery. At the trial he finally said to the plaintiff's counsel that the stop was at 2,400 feet east of the diamond.

In my opinion, the jury were quite justified in preferring the testimony of the two independent witnesses, Hughes and Kennedy,

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who had been clearing the track for this train, and who were advised of its being on the way, and were watching it from the time it whistled nearly half a mile east of the crossing until after the accident, one from the platform or landing of the tower of the home semaphore, and the other from the inside of the tower, to the testimony of the engine-driver of the Wabash train, although the latter was corroborated by some of the train-hands as to the train having been stopped between the cut and the crossing.

The two former were interested in and were closely watching the coming of the Wabash train, as they had moved their wrecking train to let it pass, and were waiting to return to their work, and after the accident they helped to remove the injured man. Not one of the train-hands mentions any circumstance to distinguish this occasion from any other of the hundreds of times they may have gone over this crossing by this night train; and, so far as the evidence shews, they were not even aware of the accident having happened until days after, except the fireman, who heard of it when he reached St. Thomas. Nester, the conductor of the Wabash train, says in his evidence that he did not know of the accident "for a long while after." The others do not say when they first heard of it. In any event it was for the jury to decide upon the conflicting evidence, and they found that the train did not stop "at a reasonable distance east of the distant signal," and the defence did not attempt to prove a stop anywhere else.

The defence asserted and attempted to prove that the train had come to a full stop between the distance semaphore and the railway cut. This the jury have negatived. The only other stop in the evidence was at Bridgeburg, two miles east of the crossing in question. It was not contended by them that this could avail them as a stop to satisfy the statute with reference to this crossing.

The above ground alone is quite sufficient, in my opinion, to justify and sustain the verdict of the jury, but the liability may be put in other ways. If the train had come to a full stop anywhere near the crossing, even for a single second, it could not have struck or injured the plaintiff, as it would have lost considerable time in getting up its speed, and in one second more the plaintiff would have been safely across the track. It is important to note that the Wabash train was in the very act prohibited by the statute at the moment it struck the plaintiff, as the tender would at that very

instant be crossing the Michigan Central track; so that the unlawful act and the injury were practically simultaneous and intimately connected.

Counsel for the company did not specifically complain of the verdict of the jury absolving the plaintiff from contributory negligence. His not observing the light of the approaching engine is, I think, sufficiently accounted for by the fact that the locomotive was hidden from him by a car of the wrecked train when he came out of the little office with his lantern, and that he may have been dazzled by the glare of lights surrounding him—from the locomotive of the wrecking train, from the home semaphore, and from the glares and lights that were being used so profusely by the men removing the wreck, which were distinctly visible to the Wabash engine-driver at the cut, before he whistled. The plaintiff might easily have mistaken the Wabash engine-light for one of these. The Wabash train also made less noise than usual on account of the heavy fall of snow during the night, and on account of the exhaust having been cut off as it was passing the distance semaphore, as described by the witness Kennedy, and its gliding quietly down the grade to the crossing. If it had stopped at or near the distance semaphore, it would have had to turn on again the exhaust on starting, and the plaintiff would then have had the additional warning of the noise of the exhaust; and of this additional warning he was deprived by the train not having stopped.

The excessive rate of speed at which the jury have found the train was going at the time of the accident works in two ways. In the first place it goes to support the finding of the jury that the train did not stop where the defence contends that it did. If it had stopped there, then it could not, according to the defendants' witnesses, have attained the excessive speed testified to by the plaintiff's witnesses, and which the jury have found that it had, when it reached the crossing. In the second place, if it had been going at a moderate rate, the plaintiff would have been able to get safely across the track before the engine reached him.

I am of opinion that the trial Judge was in error in holding that the negligence in not proceeding with sufficient care when approaching the wreckage zone was not such negligence as was complained of by the plaintiff. In my opinion, it is fully covered

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by the fourth paragraph of the statement of claim, and "excessive speed" would be such speed as would be excessive under all the circumstances of the case, and that the unusual circumstances of the wreckage, the additional lights, etc., are all to be taken into account.

Counsel for the defence took the ground that the jury had no right to pass upon the question of excessive speed, and that the right of the company as to speed was unrestricted, and cited in support thereof the judgment of the Second Divisional Court in *Minor v. Grand Trunk R.W. Co.*, 38 O.L.R. 646, where sec. 275 of the Railway Act was considered. At p. 649 it is said by Riddell, J., that "a train cannot be held to be negligently or improperly run in respect of speed unless it is transgressing the statute." After quoting the section, the learned Judge goes on to say: "It plainly says to a railway company, 'The law does not prevent you running your train at any other place at any speed you please, but in a thickly peopled portion of a city, town or village, if you wish to run at a greater speed than 10 miles an hour, you must fence your track, etc.'" And again: "The place not being thickly peopled, the jury was not at liberty to find that the speed was excessive." Although the language on its face is general and unqualified, yet I am of opinion that it should be restricted to the particular facts and circumstances of that case. It cannot surely be pretended, for instance, that a high rate of speed would not be negligent where the state of the road-bed or some other known circumstance made such speed dangerous.

I am of opinion that the language of Mr. Justice Anglin in *Columbia Bitulithic Limited v. British Columbia Electric R.W. Co.* (1917), 55 Can. S.C.R. 1, regarding highway crossings of railways, applies with equal force to railway crossings. At p. 34, he says:—

"Unless these requirements of the statute intended to lessen the danger inseparable from the running over unguarded highway level crossings at a high rate of speed are complied with, the statutory sanction, in my opinion, cannot be invoked, the common law standard of reasonableness applies, and running at a speed which, under all the circumstances, is unreasonable is unwarranted and amounts to negligence towards the public lawfully using such highways."

In my opinion, the appeal should be allowed and judgment entered for the plaintiff for \$3,000, the damages assessed by the jury, with costs throughout.

MAGEE and FERGUSON, J.J.A., agreed with MACLAREN, J.A.

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HODGINS, J.A.:—I prefer to rest the judgment in this case upon the finding of the jury that the accident happened because the servants of the respondents did not proceed “with sufficient caution approaching wreck zone which was observed.” There was evidence to support this conclusion, and it proceeds upon the rule laid down in *Orth v. Hamilton Grimsby and Beamsville Electric R.W. Co.* (1918), 43 O.L.R. 137, 43 D.L.R. 544.

The case of *Minor v. Grand Trunk R.W. Co.*, 38 O.L.R. 646, 35 D.L.R. 106, must be read as confined wholly to the question of speed, irrespective of the circumstances of the moment which must control it: otherwise its view of the rights of a railway company is too broadly stated.

I do not express any opinion as to the breach of the statutory duty to stop before reaching the crossing of two railways.

I think judgment should be entered for the appellant for \$3,000, with costs of action and appeal.

Appeal allowed.

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May 19.

[APPELLATE DIVISION.]

RE CLEGHORN.

Will—Construction—Right of Occupancy by Wife and Daughters of Testator's House—Provision for Conveyance to Daughters at End of Occupancy—“Upon Payment” of Sum to Widow in Lieu of Dower—Condition—Charge upon Property—Interpretation by Court of Ambiguous Words—Costs.

No precise form of words is necessary in order to create conditions in wills; any expression disclosing the intention will have that effect. A provision in a will, expressed in the form of a condition, may operate as a substantive gift, by creating a trust or charge.

In this case, the testator expressed the desire that his house should be preserved as a place of residence for his wife and unmarried daughters, including his married daughter if widowed. The right to occupy for two years was given to the wife and the two daughters who were unmarried when the will was made and to the third if widowed. The will then said: “If at the expiry of two years my said wife and daughters do not desire to live together in the said house, then upon payment to my said wife by my said daughters of . . . \$2,500 in cash, the said house property shall be held by my trustees for my said daughters free from any right of dower on the part of my widow. Upon and in event of the payment of the said sum to my widow in satisfaction of her right of dower . . . my . . . executors are to hold the said property and to permit my” unmarried “daughters to occupy the said premises . . . so long as she or they remain unmarried with the right of occupancy to such . . . as shall last remain unmarried.” The married daughter was to have the same right of occupancy in the event of widowhood; and upon the termination of the last right of occupancy the property was to be conveyed to the three daughters as tenants in common. Taxes, insurance premiums, and repairs were to be paid out of the general estate during the period of occupancy:—*Held*, that the provision that “upon payment” of the sum named to the widow the trustees were to hold the property for the three daughters, was a condition, and imported a charge for that amount upon what was to be obtained when payment was made, and not a mere option, allowing the daughters, by refusing to exercise it, to obtain the property subject merely to the widow's dower.

Review of the authorities.

Held, also, that the charge was upon the property itself, not merely upon the right of occupancy.

The costs of an application to the Court to determine the construction of the will and the costs of an appeal from the order made in the first instance were ordered to be paid one half by the widow and one half by the daughters, the construction of the will not being clear.

MOTION by the executors of the will of T. H. Cleghorn, deceased, for an order declaring the true construction of the will.

February 6. The motion was heard by ROSE, J., in the Weekly Court, Toronto.

John Jennings, for the executors.

H. J. Scott, K.C., and *E. F. Coatsworth*, for the widow of the testator.

J. J. MacLennan, for the daughters.

February 17. ROSE, J.:—By his will, made on the 14th June, 1913, the testator left all his property to his executors in trust, and directed them to carry on his business, if they could do so profitably, or, if they could not profitably carry it on, to sell it and any interests which he might have in leasehold properties, and he directed them to apply the profits of the business, if carried on, or the proceeds of the business and of the leaseholds, if sold, by first paying off any mortgage registered against his dwelling-house and then dividing the surplus in equal shares amongst his wife and his three daughters. He expressed a wish that his three daughters, if unmarried or widows, should make their home with the widow in the said house, and he said:—

“My said executors shall hold the said property upon trust and maintain the same and pay all rates, taxes, assessments, insurance premiums, and repairs upon the said house property, and permit my said wife and daughters to occupy the same so long as they shall all desire to do so.”

At the time when the will was made, one of the three daughters was married; another married afterwards in the lifetime of the testator; the third is still unmarried.

The will goes on to say:—

“My said wife shall have the right to use, occupy, and enjoy the said house property with my unmarried or widowed daughters in any event for the period of two years after my death. If at the expiry of two years my said wife and daughters do not desire to live together in the said house, then upon payment to my said wife by my said daughters of the sum of two thousand five hundred dollars in cash, the said house property shall be held by my trustees for my said daughters free from any right of dower upon the part of my widow.

“Upon and in the event of the payment of the said sum to my widow in satisfaction of her right of dower in said house property, my said executors are to hold the said property and to permit my daughters Edna H. Cleghorn and Anna H. Cleghorn” (i.e., the two who were unmarried at the date of the will) “to occupy the said premises . . . as long as she or they remain unmarried with the said right of occupancy to such of my said daughters as shall last remain unmarried. In the event of my said son-in-law predeceasing my said married “daughter . . . she shall

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have the same right of occupancy as is hereby given to my said" unmarried "daughters. Upon the termination of the last right of occupancy to convey the said property to my three daughters . . . as tenants in common. Taxes, rates, insurance premiums, and repairs upon the said property to be paid out of my general estate by my trustees so long as they retain the said property under the provisions hereinbefore mentioned."

Then there are certain specific bequests and a residuary clause as follows:—

"To divide all the rest, residue, and remainder of my estate among my said daughters, share and share alike."

The testator died on the 1st March, 1917. Since his death the widow has occupied the house alone, the unmarried daughter not desiring to live there. The daughters are said to desire the sale of the house, and they are unwilling to pay to the widow the sum of \$2,500 mentioned in the will. The house is said to be the only present asset of the estate, except something less than \$200 standing in the bank. The widow elected to take, in lieu of dower, the benefits conferred upon her by the will; but, upon the argument, counsel for the daughters said that if the daughters are entitled to have the house sold, and if the widow's only interest is her dower, the daughters do not desire to hold her to her election.

The questions are: is the widow entitled to live in the house unless and until the daughters pay her \$2,500; or is there a devise of the house to the daughters charged with the payment of the \$2,500; or does the house pass under the residuary devise, and is the widow's only interest her dower interest?

I think the true reading of the will is as follows:—

The house is to be held by the executors and maintained by them, at the cost of the general estate, as a residence for the widow and the unmarried or widowed daughters, for two years "in any event," and for so long thereafter as the widow and the daughters, i.e., the unmarried or widowed daughters, *all* desire to live in it together. If, at the end of the two years, the widow and the unmarried or widowed daughters do not desire to live in it together, the trust to maintain it at the expense of the general estate, as a residence for the widow and daughters, comes to an end, and the widow is entitled to have her dower realised out of it, unless the daughters pay her \$2,500 in satisfaction of her right of dower;

but, if the daughters pay the \$2,500, the executors are to hold the house and maintain it, at the expense of the general estate, as a residence for such of the daughters as are unmarried or widows, until the last right of occupancy by a daughter terminates, and, upon the termination of such last right of occupancy, are to convey it to the three daughters, as tenants in common. At the end of the two years, if the widow and the unmarried or widowed daughters do not desire to live in the house together, so that the trust to hold and maintain it as a residence for the widow and daughters comes to an end, and if the daughters do not pay the \$2,500, so that the duty of the executors to maintain it as a residence for the daughters does not arise, the house, or, rather, the proceeds after payment of the dower, goes to the daughters, share and share alike, under the residuary clause.

If this is the correct reading of the will, there is no room for the suggestion that the house is devised to the daughters subject to a charge of \$2,500 in favour of the widow: there is no direction to the daughters to pay anything; they are merely given the privilege of paying and so preventing the sale of the house and ensuring the maintenance of it, at the expense of the general estate, as a residence for such of them as are unmarried or widows.

The questions will be answered in accordance with the foregoing; and, if the parties think it desirable, there may be a declaration that, if the \$2,500 is not paid, the widow will be entitled to dower notwithstanding the execution and registration of the deed of election.

The costs of all parties will be paid out of the estate.

Clara G. Cleghorn, the widow, appealed from the judgment of ROSE, J.

March 25. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

H. J. Scott, K.C., and E. F. Coatsworth, for the appellant, argued that, under the testator's will, the devise of the house was subject to a condition that the widow should have a charge on the property for \$2,500, and that the condition was not affected by the refusal of the daughters to purchase the house. He referred to *In re Kirk* (1882), 21 Ch. D. 431, per Jessel, M.R., at p. 437.

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[MEREDITH, C.J.O., said that was a different case.] He also referred to *Wigg v. Wigg* (1739), 1 Atk. 382; *Hills v. Wirley* (1743), 2 Atk. 605; *Oke v. Heath* (1748), 1 Ves. Sr. 135. The *Kirk* case, *supra*, is an authority in favour of the appellant. In that case, the learned Master of the Rolls thought that the testator did "not intend the devisee, by refusing to perform the condition, to disappoint . . . the legatee," and the same view should prevail in the case at bar.

J. J. Maclellan, for the respondents, the daughters of the testator, relied upon the judgment of Rose, J., and argued that the alleged condition was merely an option, which the respondents might exercise, or not, at their discretion.

John Jennings, for the executors.

Scott, in reply.

May 19. The judgment of the Court was read by HODGINS, J.A. (after quoting a portion of the judgment of ROSE, J.):—Three daughters are living, one was married at the time the will was made, one has since married, and one is still unmarried. The property in question is No. 106 St. Vincent street, in Toronto.

The clause of the will upon which the appeal turns is in effect as follows:—

(c) "It is my sincere and earnest desire that my three daughters if unmarried or widowed shall make their home with my dear wife at 106 St. Vincent street and that they shall occupy and enjoy the same together and my said executors shall hold the said property upon trust and maintain the same and pay all rates, taxes, assessments, insurance premiums, and repairs upon the said house property and permit my said wife and daughters to occupy the same so long as they shall all desire to do so.

(d) "My said wife shall have the right to use, occupy, and enjoy the said house property with my unmarried or widowed daughters in any event for the period of two years after my death. If at the expiry of two years my said wife and daughters do not desire to live together in the said house, then upon payment to my said wife by my said daughters of the sum of two thousand five hundred dollars in cash, the said house property shall be held by my trustees for my said daughters free from any right of dower on the part of my widow.

(e) "Upon and in event of the payment of the said sum to my widow in satisfaction of her right of dower in said house property. my said executors are to hold the said property and to permit my daughters Edna S. Cleghorn and Anna H. Cleghorn to occupy the said premises 106 St. Vincent street, Toronto, as long as she or they remain unmarried with the right of occupancy to such of my said daughters as shall last remain unmarried. In the event of my said son-in-law predeceasing my said daughter Ella L. Choquette she shall have the same right of occupancy so long as she does not re-marry as is hereby given to my daughters Edna S. Cleghorn and Anna H. Cleghorn. Upon the termination of the last right of occupancy to convey the said property to my three daughters Ella L. Choquette wife of the said Robert Choquette hereinbefore mentioned, Edna S. Cleghorn and Anna H. Cleghorn as tenants in common. Taxes, rates, insurance premiums, and repairs upon the said property to be paid out of my general estate by my trustees so long as they retain the said property under the provisions hereinbefore mentioned."

From a survey of the whole will it is evident that the desire of the testator was to preserve the house as a residence for his wife and unmarried daughters, including his married daughter if widowed.

To this end he directed the winding-up of his business and the payment of the mortgage upon the house. The amount realised from his business, however, proved insufficient to discharge the incumbrance, which was for \$1,700. If the \$2,500 is a charge upon the property, the equity is worth, it is said, about \$2,200.

The question turns upon the meaning of the phrase "upon payment," which, if a condition, imposes a charge upon the property or upon the right of occupancy thereof given by the will.

The right to occupy for two years is given to the wife and the two daughters then unmarried as well as to the third if widowed. The expression "wife and daughters" must therefore include, as a matter of construction, the married daughter, because the testator evidently intended to give her a right which, though inchoate, might become actual within the two years.

And so the words "my said daughters," which occur twice in clause (d), refer to all these previously mentioned.

Jarman on Wills, 6th ed., pp. 1461, 1462, says:—

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"No precise form of words is necessary in order to create conditions in wills; any expression disclosing the intention will have that effect. Thus a devise to A., 'he paying' or 'he to pay £500 within one month after my decease,' without more, would at common law create a condition, for breach of which the heir might enter. . . . But the intention must be definitely expressed. . . . A provision in a will, expressed in the form of a condition, may operate as a substantive gift, by creating a trust or charge."

For this is cited, *inter alia*, Co. Litt. 236.b.: "so if lands be devised to one *ad solvendum* £20 to I. S. or paying £20 to I. N. this amounts to a condition." Then the following case is added:—

"And *Crickmer's* case was this: A man seised of certaine lands holden in socage had issue two daughters A. and B. and devised all his lands to A. and her heires, to pay unto B. a certaine summe of money at a certaine day and place; the money was not paid, and it was adjudged, That these words, 'to pay,' etc. did amount in a will to a condition; and the reason was, for that the land was devised to A. for that purpose, otherwise B. to whom the money was appointed to be paid, should be remediesse, *et interest reipublicæ suprema hominum testamenta rata haberi*: and the lessee of B. upon an actuall ejectment recovered the moitie of the land against A."

Coming from that general statement to what is in issue here, Sir George Jessel, M.R., advances the matter by indicating the way in which a condition may operate so as to give a charge or create a trust and thus prevent a forfeiture.

He says in *In re Kirk*, 21 Ch. D. 431, at p. 437:—

"My view of those authorities is this, that though the words 'on condition' may be used by a testator, he does not mean to leave it to the choice of the devisee to say whether or not the person who is to take the benefit which is the subject of the condition, is to have it or not. The form looks like it, but the substance is not so. The substance is that he intends the legatee or devisee to perform the condition, and the person who takes the benefit of it is to have it in any event. In other words, it is that he does not intend the devisee, by refusing to perform the condition, to disappoint the person whom I will call the legatee, nor does he intend the death of the devisee to disappoint the legatee."

In that case the condition required the devisee to give up all claim to a sum of £3,400 due to him by the testator and in the will erroneously said to be charged by way of equitable mortgage on the property devised. The result of the decision was that, although the devisee had died in the lifetime of the testator, the condition had bound the land and the debt of £3,400 must be discharged out of it.

In addition to the cases cited on the argument the following seem to be in point:—

In *Barnardiston v. Fane* (1699), 2 Vern. 366, Edward Rothwell devised his real estate to his kinsman Sir Richard Rothwell, "paying £1,000 apiece" to his two daughters. The money not being paid, the daughters brought ejectment and succeeded. Sir Richard Rothwell's heirs afterwards brought their bill to be relieved, and obtained a decree for that purpose, paying what remained unpaid of the £2,000 with interest and costs.

In *Hodge v. Churchward* (1847), 16 Sim. 71, the will contained a devise of certain tenements to the son Matthew for life and after his decease to the first, second, third and fourth sons, and so on, lawfully begotten, paying to the wife £16 a year and to the daughter £10 a year. Vice-Chancellor Shadwell said: "The word 'paying' creates, not a trust, but a charge or condition."

In *In re Welstead* (1858), 25 Beav. 612, the words "in consideration of" were held to import a condition.

The case of *Hodge v. Churchward* was followed in *Cunningham v. Foot* (1878), 3 App. Cas. 974. Lord Cairns, L.C., says of it and in reference to the will in question in the case he was deciding (pp. 989, 990):—

"It was decided, and the decision has always been followed and never quarrelled with since, in the case of *Hodge v. Churchward*, that a devise of land to pay a sum of money to A.B. was a charge, and was not a trust for A.B. And, my Lords, the word 'pay' surely cannot mean more than the words 'well and truly pay,' and the words, 'well and truly pay' must mean simply on condition of well and truly paying; and, therefore, it being established law that a devise to A. 'paying' a sum of money to B. is not a trust, but is a charge, it must also be the law that a devise to A. 'to well and truly pay' to B. is not a trust, but is a charge; and a devise to A., 'on the condition of well and truly paying,'

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must be a charge and not a trust. Therefore, taking the word 'legacies' to include the annuity, there is here a devise of the remainder of Seskin Ryan to the son, at the utmost charged with the condition of paying the annuity, that is to say, the arrears of the annuity, to the widow."

Lord Selborne, who took part in the judgment, also alluded to *Hodge v. Churchward* in this way (p. 1002):—

"I cannot distinguish the present case from *Hodge v. Churchward*, because (though the word 'condition' was not in that will) it was used in the judgment of Sir Launcelot Shadwell in a manner which proves that he would not have considered its addition to make any difference. The gift there was of lands to a tenant for life and remainderman 'paying to' the testator's wife and daughter certain annuities. The Vice-Chancellor said: 'The word "paying" creates, not a trust but a charge or condition; and therefore the plaintiff's claim is barred by the statute.'"

In *Re Oliver* (1890), 62 L.T.R. 533, Chitty, J., determined that the words "he paying thereout the following legacies" imported either a charge or a trust, and decided that, in the particular will then before him, a charge was created.

I think these cases indicate the principle upon which this will must be construed. The provision is that "upon payment" of the sum of \$2,500 to the widow the trustees are to hold the house property for the three daughters.

The words appear to import a charge for that amount upon what is to be obtained when payment is made, and not a mere option, allowing the daughters, by refusing to exercise it, to obtain the property subject merely to the widow's dower.

Now upon what is the charge created? Is it upon the right of occupancy only or upon the property itself?

By clause (d), upon payment being made, the trustees are to hold the property free from the widow's dower "for my said daughters."

The terms of the holding are then defined. They are to permit two daughters while unmarried or the married one if widowed to occupy the premises. Upon the last right to occupy ceasing then the property is to be conveyed to the three daughters as tenants in common. I think it may reasonably be said that the holding of the property and the payment of the taxes, insurance,

and repairs upon it for the period of occupancy is not for the benefit only of those entitled to occupy, but for all three whose ultimate advantage could only be secured if the outgoings were met so as to preserve it for them. That fits in with the earlier disposition, "to hold it for my said daughters," and that expression should control the after-provision as to occupancy, and relegate that right to a mere temporary use imposed for the better enjoyment of the property in specie by some one or more of the beneficiaries while unmarried. If a life-estate had been given to one daughter only, it would not have been possible, as it seems to me, to hold that the payment of the \$2,500 was to be charged upon the life-estate, in face of the earlier direction to hold the "said house property for my said daughters," which came into effect immediately upon the payment being made.

The result is that the judgment in appeal should be reversed and the questions answered in accordance with this opinion.

As this judgment construes a will which is not clear, and whose phraseology gives rise to the ambiguity, the costs of all parties of the application and appeal should be borne one half by the appellant and one half by the daughters, those of the executors as between solicitor and client.

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Appeal allowed.

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[APPELLATE DIVISION.]

May 19.

HUTTON v. TORONTO R.W. CO.

Workmen's Compensation Act—Employee in Course of Employment Injured by Negligence of Third Person—Election to Claim Compensation from Board—Payment of Compensation-money by Board—Board Subrogated to Rights of Injured Person—4 Geo. V. ch. 25, sec. 9—Action Brought by Injured Person against Wrongdoer—Recovery of Judgment for Damages and Costs—Action Maintainable in Name of Injured Person—Amount of Judgment to be Paid to Board—Consent of Board after Judgment to Withdrawal of Election—Appeal from Judgment—Meaning and Effect of "Subrogation."

The plaintiff, driving a waggon, in the course of his employment, in a public highway, was injured by reason of a collision of his waggon with a street-car of the defendants, and in this action recovered a judgment for damages and costs against the defendants, based upon a finding of the jury that the defendants were guilty of negligence. Before action, the plaintiff had elected, under the Ontario Workmen's Compensation Act, 4 Geo. V. ch. 25, sec. 9 (3), to claim, and had received, compensation from the Workmen's Compensation Board for his injuries. In the action, the defendants did not until the trial set up as a defence the plaintiff's election and claim; but, by leave, after the jury had been discharged, they added the defence that the plaintiff had expressly elected to claim compensation under the Act, and had expressly released all right of action against the defendants in respect of his injuries, and that the plaintiff's claim against the defendants was barred by the provisions of the Act. This defence was supported by a written election, signed and sealed by the plaintiff and filed with the Board. After the judgment in the action and after notice of appeal therefrom had been given by the defendants, the Board, in writing, consented and agreed that, for the purposes of the action, the plaintiff should be permitted to withdraw his election to claim compensation from the Board, and the Board released and assigned to the plaintiff, as from the date of the election, all its rights and title to proceed against the defendants for the cause of action involved therein, provided that, in the event of the action failing by reason of the right to bring such action being vested in the Board and not in the plaintiff, the Board was to be entitled to bring such action as it would have been entitled to bring if this consent had not been given. Upon the appeal from the judgment in the action, the defendants contended that the action was not maintainable in the name of the plaintiff, and on his own initiative:—

Held, upon a consideration of sub-secs. 1, 2, and 3 of sec. 9 of the Act, that effect could not be given to the contention of the defendants: the difficulties which might arise from permitting the person injured, after such an election, to sue the tort-feasor, were inseparable from the situation created by the right of subrogation given by sub-sec. 3; the effect of the election was not to release the wrongdoer, but to subrogate the Board to the rights of the workman and enable it to maintain an action in his name for the benefit of the accident fund.

The only right given to the Board by the election was that of subrogation (with of course the added power to sue in the Board's own name.) That right does not prevent the enforcement by the person possessed of the cause of action in his own name; but, once the right of subrogation has arisen, he can do nothing to prejudice the person subrogated. Subrogation can be enforced at any time, whether the original claim is one *in fieri* or has been pressed to a recovery.

The effect of subrogation and the practice in enforcing it considered and authorities referred to.

The appeal was dismissed with a direction that the amount of the judgment should be paid to the Board, to be dealt with by it in due course.

AN appeal by the defendants from the judgment of LATCHFORD, J., at the trial, upon the findings of a jury, in favour of the plaintiff, for the recovery of \$2,500 and costs, in an action for damages for injury to the plaintiff by reason of a collision of a waggon, which he was driving in a public highway in the city of Toronto, with a street-car of the defendants; the plaintiff alleging that the collision was caused by the negligence of the defendants' employees in charge of the car.

It appeared that, before action, the plaintiff had elected, under the Workmen's Compensation Act, 4 Geo. V. ch. 25, sec. 9 (3), to claim compensation from the Workmen's Compensation Board, and had received compensation from the Board—the injury to him having occurred in the course of his employment, i.e., while driving a waggon for his employers, the Canada Bread Company of Toronto.

March 24. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

H. H. Dewart, K.C., and *G. S. Hodgson*, for the appellants, argued that the finding of the jury as to undue speed was not justified by the evidence. [This ground was disposed of, adversely to the defendants, without calling upon the plaintiff's counsel.] They also argued that the plaintiff, having elected, before the action was brought, to claim compensation under the Workmen's Compensation Act (4 Geo. V. ch. 25, sec. 9), and having received such compensation, was debarred from bringing the present action. The plaintiff had assigned all his rights to the Workmen's Compensation Board, and agreed that the Board should be subrogated to his rights. The Board had no right to re-assign to the plaintiff, as it had assumed to do. Reference was made to Halsbury's Laws of England, vol. 17, p. 492, note (o), where *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333, is cited; *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K.B. 639; *Huckle v. London County Council* (1910), 26 Times L.R. 580, affirmed 27 Times L.R. 112; *Codling v. John Mowlem and Co. Limited*, [1914] 2 K.B. 61, affirmed in *S. C.*, [1914] 3 K.B. 1055.

William Proudfoot, K.C., for the respondent, the plaintiff, argued, on the question of law, that the defence was not pleaded till after the verdict was given, and was too late. He referred to

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sec. 60 of the Act as justifying the action of the Board; *Toronto R.W. Co. v. King*, [1908] A.C. 260; *Re Labute and Township of Tilbury North* (1918), 44 O.L.R. 522. [MEREDITH, C.J.O., referred to *Ancona v. Marks* (1862), 7 H. & N. 686, cited in Maclaren on Bills Notes and Cheques, 5th ed., p. 238.] *Kent v. La Commu-nauté des Sœurs de Charité de la Providence*, [1903] A.C. 220.

Dewart, in reply.

May 19. The judgment of the Court was read by HODGINS, J.A.:—Appeal by the defendants from the judgment at the trial before Latchford, J., and a jury. A verdict was found for the respondent for \$2,500, and certain questions answered as follows:—

“1. Was the accident to the plaintiff caused by the negligence of the defendants? A. Yes.

“2. If so, in what did such negligence consist? A. Street-car running too fast.

“3. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

“4. If so, in what did such want of reasonable care consist? A. —.

“5. What damages has the plaintiff sustained by reason of the accident? A. \$2,500.”

Two points were argued before us:—

First, it appearing that, before action was brought, the respondent had elected, under the Workmen's Compensation Act, 4 Geo. V. ch. 25, sec. 9, sub-sec. 3, to claim compensation from the Workmen's Compensation Board, and had received compensation from that source, whether the present action was maintainable in the name of the respondent, and on his own initiative.

Secondly, whether there was any evidence to justify the finding that the negligence consisted in the street-car running too fast.

The last point was disposed of at the hearing adversely to the appellants, leaving only the other ground for decision.

The appellants failed to set up the effect of sec. 9, sub-sec. 3, until the trial, when they did so, by leave, after the jury had been discharged.

Their added plea is as follows:—

“The defendants say that the plaintiff expressly elected to claim compensation for his injuries under the provisions of Part I.

of the Workmen's Compensation Act, 4 Geo. V. ch. 25, and amending Acts, and has expressly released and forgone all right of action against the defendants in respect of the said injuries; and that the plaintiff's claim against the defendants is barred by the provisions of the said Act."

It seems that on the 12th May, 1918, the respondent had executed a document worded as follows:—

"Form No. 36

Claim No. 74310

"Sec.

"The Workmen's Compensation Act.

"(Ontario 4 Geo. V. ch. 35)

"Election to claim under Part I. of the Act.

"Whereas on or about April 17, 1918, I, Alexander Hutton, employed by Canada Bread Company of Toronto, received injuries by accident arising out of and in the course of my employment as follows: compound fracture of the leg. And whereas it is alleged that such accident and injuries were caused by the negligence or wrongful act or breach of duty of some person or persons other than my said employer. Now therefore I, the said claimant, do hereby elect to claim compensation for said injuries under the provision of Part I. of the Workmen's Compensation Act (4 Geo. V. ch. 25, Ontario), and I hereby forgo any and all my right or rights of action whatsoever against such third party or parties in respect of such accident and injuries, it being understood that by this election the Workmen's Compensation Board is subrogated to all my rights, rights of action, and remedies which otherwise I would have against such third party or parties in respect of said accident and injuries.

"In witness whereof I have hereunto set my hand and seal at Toronto in the County of York the 12th day of May, 1918.

"Signed sealed and delivered

in presence of

"(Witness)

"Fred. Cotterell

Alex. Hutton (Seal).

(claimant)

"I certify this to be a true copy of election to claim under Part I. of the Act, filed with the Workmen's Compensation Board.

"R. W. Davies,

"Assistant Secretary" (Seal).

The writ in this action was issued on the 20th June, 1918, and

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the case tried on the 3rd and 4th December, 1918 Judgment was settled on the 18th December, 1918, pursuant to the verdict of the jury, and notice of appeal was given on the day following. On the 8th January, 1919, the following notice was served by the respondent on the appellants' solicitors:—

"Take notice that the Workmen's Compensation Board has appointed Friday the 10th day of January, 1919, at the hour of 11 o'clock in the forenoon, in the board-room at the Normal School Buildings, Toronto, to hear the application on behalf of the plaintiff for a consent by the Board ratifying all proceedings that have been taken or may hereafter be taken in this action by or on behalf of the plaintiff.

"Dated at Toronto this 8th day of January, 1919."

Pursuant thereto, the Workmen's Compensation Board consented and agreed as set forth in the following document, of which only a copy is found among the papers used on the appeal. It is as follows:—

"The Workmen's Compensation Act
"Ontario.

<p>"Present Samuel Price, Chairman, " " George A. Kingston, Commissioner</p>	}	<p>Thursday the 16th day of February, 1919.</p>
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"In the matter of claim 74319—Alexander Hutton.

"And in the matter of an action in the Supreme Court of Ontario between Alexander Hutton, plaintiff, and the Toronto Railway Company, defendants.

"Upon the application of the plaintiff, made unto the Workmen's Compensation Board on Tuesday the 14th day of January, 1919; and upon hearing counsel for both parties:—

"The Workmen's Compensation Board hereby consents and agrees that, for the purposes of the said action, the said plaintiff be permitted to withdraw his election to claim compensation from the said Board, and for the said purposes the said Board hereby releases and assigns to the said plaintiff, as from the date of the said election, all its rights and title to proceed against the said defendants for the cause of action involved therein, provided that, in the event of the said plaintiff's action failing by reason of the right to bring such action being vested in the said Board and not in the said plaintiff, the said Board is to be entitled to bring such

action as it would have been entitled to bring if this consent had not been given.

(Seal)

"N. B. Wormwith, Secretary.

"I certify the foregoing to be a true copy of a consent of the Workmen's Compensation Board bearing date Thursday the 16th day of February, 1919."

"N.B. Wormwith, Secretary, Workmen's Compensation Board."

The appeal was argued on the 24th March, 1919.

On the argument I was under the impression that to permit the respondent, after election, to sue the tort-feasor would or might result in embarrassment, and promote instead of preventing litigation.

Further consideration has brought me to the conclusion that these difficulties are inseparable from the situation created by the right of subrogation, and that the objection of the appellants cannot, on that ground, be given effect to. Sub-sections 1, 2, and 3 of sec. 9 of 4 Geo. V. ch. 25, are as follows:—

"(1) Where an accident happens to a workman in the course of his employment under such circumstances as entitle him or his dependants to an action against some person other than his employer the workman or his dependants if entitled to compensation under this Part may claim such compensation or may bring such action.

"(2) If an action is brought and less is recovered and collected than the amount of the compensation to which the workman or his dependants are entitled under this Part the difference between the amount recovered and collected and the amount of such compensation shall be payable as compensation to such workman or his dependants.

"(3) If the workman or his dependants elect to claim compensation under this Part the employer, if he is individually liable to pay it, and the Board if the compensation is payable out of the accident fund shall be subrogated to the rights of the workman or his dependants and may maintain an action in his or their names against the person against whom the action lies and any sum recovered from him by the Board shall form part of the accident fund."

These provisions differ from those regarding the Board and the employer, by which the right of action is taken away and the

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compensation substituted (secs. 13 and 15). Under sec. 9 both compensation and action are regarded as being within the right of the workman (sub-sec. 2), and the effect of an election is not to release the wrongdoer but to subrogate the Board to the rights of the workman and enable it to maintain an action in his name for the benefit of the accident fund.

Subrogation is not an assignment of the workman's right of action, but it is a legal fiction whereby the Board becomes entitled to everything that is produced by that right of action. And, by sec. 9, there is given statutory authority to sue in the workman's name. This latter provision adds nothing to the rights arising out of subrogation, because, having become entitled to everything produced by the right of action, the Courts have always allowed the person subrogated to use the name of the other to realise and get in the proceeds.

It is subject to this essential element in subrogation that the words in exhibit 4—"I hereby forgo any and all of my right or rights of action whatsoever against such third party or parties"—must be read. Indeed they are immediately followed and controlled by the recognition of the statutory right of subrogation to which the election is subject. The effect of subrogation and the practice in enforcing it may be seen by reference to the following cases:—

In *Mason v. Sainsbury* (1782), 3 Douglas K.B. 61, twice argued, an action on the Riot Act, brought in the insured's name by the insurance company, for damage to his house during the riots, it was held that the Hundred, which by the Act was made liable in damages, could not set up the receipt by the plaintiff of the insurance money as a bar. It was argued that, having two remedies, he had selected that which was most proper. The decision affirmed the right of recovery, and that there was no satisfaction of which the defendants could take advantage. This case was followed in *Yates v. Whyte* (1838), 4 Bing. N.C. 272, and in *Simpson v. Thomson* (1877), 3 App. Cas. 279. See also *The Charlotte*, [1908] P. 206.

In *Commercial Union Assurance Co. v. Lister* (1874), L.R. 9 Ch. 483, the defendant was insured for £33,000, and the loss by a gas explosion was £50,000. The loss, it was said, was caused by the negligence of the Corporation of Halifax, by whom the gas

was supplied. The defendant began an action against the corporation, and the present action was brought by the insurance company, praying for a declaration that they were entitled to the benefit of any right of action vested in the defendant, and for an injunction preventing the plaintiff suing except for the whole amount of damage. Sir G. Jessel, M.R., in discussing the case, says (p. 484, note):—

“ . . . the insurance company or companies is or are willing to pay the amount of the insurance, and they say that, having paid that amount (they pay of course by way of indemnity), if the assured obtains from the Corporation of Halifax a sum larger than the difference between the amount of the insurance and the amount of the loss, he is a trustee for that excess for the insurance company or companies—a proposition which I take to be indisputable. But then they want to go further, and they assert that in such a case the insured person, though entitled to bring an action for the loss he has sustained, is not entitled to be master of that action; and they assert that, though he is bringing it *bonâ fide*, and is acting *bonâ fide*, he is not entitled to compromise that action, or to do anything else, without their assent. I can find no ground whatever for such a suggestion. He is entitled to bring an action against the corporation for the injury to himself. He is entitled, and is bound, and has agreed, as there is one cause of action, to bring the action for the whole loss to himself, including that part of the loss against which he is indemnified by the insurance companies; and he is not entitled to compromise that action otherwise than *bonâ fide*.”

On appeal Sir W. M. James, L.J., in delivering the judgment of the Court, said (pp. 486, 487):—

“The defendant has undertaken to sue for the whole amount; which means that he must sue for the whole amount whatever that amount may be. If I were to put him under any restriction about compromising, or anything of that kind, it would be determining the whole case, and deciding that he is a trustee for the insurance companies. That, however, is a matter not to be determined on this interlocutory application, and I cannot now say that he is a trustee in such a way that he is to be deprived of his own free action with respect to a matter in which he is personally and very largely interested. Then the Master of the Rolls, in

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the course of his judgment, threw out an observation that if the defendant compromises, he must compromise *bonâ fide*; but what that is the Master of the Rolls has not determined, and I do not determine. Mr. Lister is by this order left free to go on with and to conduct this action. If he does anything in the conduct of the action inconsistent with his duty, whatever that duty may be (which will have to be determined at the hearing of the cause), he will have to make good any loss thereby incurred. If he does nothing else but that which he is clearly entitled to do, having regard to the position he is in, and to the position of the other parties, then he will be liable to nothing. At present he is himself *dominus litis*, subject to a liability to answer in this Court for anything which, upon the hearing of the cause, should be shewn to be a breach of some equitable obligation or a violation of some equitable duty which has been cast upon him by reason of the circumstances of the case."

That case deals with the same element mentioned by the late Chancellor in *National Fire Insurance Co. v. McLaren* (1886), 12 O.R. 682. He says, at p. 687:—

"The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other, of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company. In the case in hand the plaintiffs are in some sense sureties, by way of contrast with the wrongdoers, who are primarily liable, just as the defendant may be in some sense a trustee for the insurers of any such overplus. But it appears to me to be a begging of the question to assert that he is a trustee from the time of payment by the insurers."

The extent to which the right of subrogation goes is seen in *King v. Victoria Insurance Co.*, [1896] A.C. 250, where, the claim of the assured having been settled by the insurance company, the defendant who caused the loss, on being sued by the insurance company, set up that the loss was not within the terms of the policy and so not recoverable against him. Lord Hobhouse, in delivering the judgment, said (pp. 254, 255):—

“To their Lordships it seems a very startling proposition to say that when insurers and insured have settled a claim of loss between themselves, a third party who caused the loss may insist on ripping up the settlement, and on putting in a plea for the insurers which they did not think it right to put in for themselves; and all for the purpose of availing himself of a highly technical rule of law which has no bearing upon his own wrongful act. It is not alleged that there was anything but perfect good faith in the claim made by the bank and satisfied by the insurance company. It is not alleged that the question of negligence has not been as fully and fairly tried in this action as it could have been in an action by the bank; or that the government has been in any way prejudiced by the form of the action. But it is claimed as a matter of positive law that, in order to sue for damage done to insured goods, insurers must shew that if they had disputed their liability the claim of the insured must have been made good against them. If that be good law, the consequence would be that insurers could never admit a claim on which dispute might be raised except at the risk of finding themselves involved in the very dispute they have tried to avoid, by persons who have no interest in that dispute, but who are sued as being the authors of the loss. The proposition is, as their Lordships believe, as novel as it is startling; at least Mr. Cohen was unable to furnish any authority for it, and they know of none. Yet it is difficult to suppose that such cases have not frequently occurred.”

Applying the principles involved in these cases to the present action, what is there to prevent the rights of a person entitled to compensation being worked out either before or after election as he may prefer, always subject to the right of the Board, which, if there has been an election, can claim the proceeds of the action recovered or collected? The election is to be made within three

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months after the accident, and it gives the Board, when made, the right, if it so desires, to enforce the workman's cause of action. It also carries with it subrogation, which is consistent with the bringing of an action by the workman, but changes the ownership and destination of the proceeds. If the action is brought after election, and that election cannot be set up by the tort-feasor, what wrong is perpetrated or injury done if the Board and the workman act upon it or revoke and abandon it? I can see none. I think sub-sec. 2, under which recovery would often be made long after election, points strongly to this conclusion. Another consideration is this. All claims for compensation are to be determined by the Board. A claim may be made within 6 months or thereafter if allowed by the Board. If the workman has to elect, in the sense that he is finally either upon the Board or upon the wrongdoer, he may be compelled to act without knowledge of what the Board will do and the amount which it will finally allow. It would seem to be more in accordance with the intention of the Act to allow this election to be made provisionally in order to save the claim of the workman, preserving at the same time to the Board its right to the proceeds recovered or to intervene in any settlement. If the election once made is final (and assuming that the words "may claim compensation" in sec. 9, sub-sec. 1, mean exactly the same thing as "elect to claim" in sub-sec. 3, as to which compare sec. 20 and sec. 21), its only effect would be to entitle and often compel the Board to bring the action in the name of the workman; whereas, if the election is revocable, no injustice can ensue, for the right of action is the workman's, and either he or the Board can always enforce it. There is another aspect of this question which seems to point in the same direction. By the Act, the basis of compensation is fixed, but a jury is not bound by any such rigid scale. Why, in case of an accident, should the workman not be able to try his luck if he so desires without losing the right to come to the Board if he gets no more than it would give him? The Board would not suffer, for in that event it would be entitled to the benefit of any verdict recovered.

It may have been the intention of the Act to leave the workman free to sue notwithstanding election in case his loss is more severe than would be made good by compensation under the

statute, the provision as to subrogation enuring meantime to the benefit of the Board. No settlement or renunciation of rights can of course affect the person subrogated, where that doctrine becomes operative: *West of England Fire Insurance Co. v. Isaacs*, [1896] 2 Q.B. 377, [1897] 1 Q.B. 226; *Phœnix Assurance Co. v. Spooner*, [1905] 2 K.B. 753.

The case of *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K.B. 639, differs upon a clear point from this case. The Act in question there provided that in case of injury by a person other than the employer, "the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both."

There is no such provision in the Ontario Act, but the contrary. That an action does not divest the right to compensation is evident from sub-sec. 2; and that under sub-sec. 3 the proceeds of an action brought by the assured belong to the Board, or that the Board may itself bring one, is equally clear. But nowhere is there any statutory bar to such a proceeding as was taken in the present case, and its propriety must therefore be judged wholly on the wording of the statute.

I draw attention, as a valuable guide in construing our statute, to the words of Romer, L.J., in the case I have just discussed. He says at p. 651:—

"In the first place, I may point out that under sec. 6 it cannot, I think, be said that a workman must necessarily be held to have exercised the option given to him as against his employers, or as against the stranger liable, merely because he has taken some proceedings either at law against the stranger or under the Act as against the employer. Whether the proceedings would in fact be such as to bind the workman must depend upon the circumstances of each case, including a consideration of what has resulted from the proceedings, and whether or not any injury will result if the proceedings are held not to irrevocably bind the workman.

"Further, I should like to say, for myself, that in dealing with any particular case I should try and look at it as a matter of substance, and decide it on the substance rather than on matters of form. I will further add that, as at present advised, though it is not necessary for me to express a final opinion on the point for

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the determination of this case, I am disposed to think that proceedings by a workman against his employer for compensation should not be held to irrevocably bind the workman in the exercise of the option given him by sec. 6 unless those proceedings have resulted in some compensation, as such, being paid to and received by the workman in such a manner so as to bind both parties."

I base my judgment upon the fact that the only right given to the Board by the election is that of subrogation (with of course the added power to sue in the Board's own name). It is undoubted that that right has never prevented the enforcement by the person possessed of the cause of action in his own name, and it is equally undoubted that once the right of subrogation has arisen he can do nothing to prejudice the person subrogated. That right can be enforced at any time, whether the original claim is one *in fieri* or has been pressed to a recovery—and all the inconveniences and difficulties suggested by the appellants arise from and flow out of this peculiar fiction and from that alone. By it there is no interference with the original right—it is that which is enforced. And there is nothing, once subrogation arises, that can be done by the claimant to divest the person subrogated of his due. But there is the possibility of double litigation, of settlements not agreed to by the original claimant and by the person subrogated, and of suit by the original claimant after election, as here. But these are all covered, either by actual decision or in principle, by the cases I have mentioned.

The situation created by the election spoken of in the statute and its consequences casts no additional burden upon the wrongdoer, nor one which differs in any way from that which he has brought on himself by his wrongful act. He has no concern with the dealings of the Board and the claimant; and, unless he is prejudiced, he has no right to complain. In this case the respondent's cause of action is not divested: it exists still in him, but, if enforced by him, it must be for the benefit of the Board if he has signed an election.

The meaning and effect of subrogation received explicit attention from the Court of Appeal (Brett, Cotton, and Bowen, L.JJ.) in *Castellain v. Preston* (1883), 11 Q.B.D. 380.

The definition, taken from the judgment of Brett, L.J., is thus stated in the head-note:—

“According to the doctrine of subrogation, as between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished.”

This was followed in *Assicurazioni Generali de Trieste v. Empress Assurance Corporation Limited*, [1907] 2 K.B. 814, by Pickford, J.

The American view is well summarised by the late Mr. Justice Burbidge in *The Queen v. O'Bryan* (1900), 7 Can. Ex. C. R. 19.

It will be observed from the definition given in the leading case that the right may be exercised in the case of a tort, after the remedy has been insisted upon just as well as before its enforcement. But I think the artificial documents procured after verdict are not sufficient to change the situation created by the statute. After the election and while it stands, whether tentative or final, the Board is subrogated to the respondent's rights and claims. That is the position to-day, and the Board cannot divest itself of the position of trustee of the amount recovered for the accident fund, without effective action on its part, having regard to its duties and responsibilities as a Board. If, on considering the whole situation, it chooses to hand over to the respondent the amount of the judgment, no doubt it can do so, or deal with it as the statute gives it power. But the dismissal of the appeal should be preceded by a direction that the amount of the judgment should be paid to the Board, to be dealt with by it in due course. Balancing the conveniences and inconveniences of the situation, and looking at the omission of any peremptory restriction upon the injured workman pursuing both remedies, particularly where, as here, he has the consent or has obtained the subsequent ratification or approval of the Board, I think the objection made by the appellants must fail. The appeal should be dismissed.

Appeal dismissed with costs.

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May 20.

GROSSMAN v. MODERN THEATRES LIMITED.

Landlord and Tenant—Lease of Theatre—Covenant of Lessee not to Assign or Sublet without Leave—Proviso that Leave not to be Unreasonably Withheld—Agreement for Sale of Lease—Possession Taken by Proposed Assignee—Execution by Lessee of Assignment for Purpose of Tendering to Lessors for Consent—Breach of Covenant—"Setting-over" of Premises—Short Forms of Leases Act—Forfeiture—Waiver by Acceptance of Rent—Proof that Consent Unreasonably Withheld—Evidence—Onus—Claim by Proposed Assignee for Specific Performance of Agreement—Failure of—Rescission—Return of Money Paid—Conduct of Proposed Assignee—Money Paid on Consideration which Failed—Solicitors—Contract to Repay Money—Consideration.

The company, assignees of the lease of a theatre, agreed to sell to G. the lease and the equipment in the theatre for \$5,500, payable \$1,000 down, \$2,000 "on the date of closing," and \$2,500 with interest "in six weeks from said date." If the \$2,500 was not so paid, the agreement was to become void, and any moneys paid were to be forfeited. G. paid the \$1,000 and the \$2,000 to S., acting for the firm of S. & Co., solicitors for the company. The lease was expressed to be made under the Short Forms of Leases Act; it contained a covenant on the part of the lessee not to assign or sublet without leave, and there was a proviso that leave should not be unreasonably withheld. The lease was for five years at a rent of \$1,800, payable monthly in advance. When the \$2,000 payment was made, S. was asked what would be done with the \$3,000 in case the lessors' consent to the assignment was not obtained, and he stated that it would be returned, whereupon the payment was made. It was provided in the agreement that G. should take possession on the date of closing and keep an account of all money received by him and paid out until he paid the \$2,500; and that the assignment of the lease should remain in the hands of S. & Co., and should not take effect until the \$2,500 was paid. As soon as the agreement was signed, G. went to the theatre and assumed to act as owner, except that he handed over the receipts each day to the company's agent. G. had some altercation in or near the theatre with M., one of the lessors, who had agreed to heat and clean the theatre; and M., before the six weeks were up, wrote a letter to S. & Co. telling them that no consent to an assignment to G. would be given, and that the company would be held liable for the rent. At the end of the six weeks an assignment of the lease, which was executed so that it could be tendered for the lessors' consent, was presented to them; they refused their consent, giving reasons in writing for their refusal:—

Held, that, as the assignment was not delivered to G., and was signed merely in order that there should be something formal to submit to the lessors, the mere signature of the paper for such a purpose could not be treated as a breach of the covenant.

If there was an assignment by the putting of G. in possession pursuant to the term in the agreement, or a "setting-over" of the premises for the six weeks (see the long form of the covenant in the Short Forms of Leases Act, R.S.O. 1914, ch. 116), so that there was a breach of the covenant, the forfeiture was waived by the lessors—they, after G. had announced that he was assignee and had been seen by M. in and about the theatre, having written the letter insisting that the company should continue liable for the rent, and two weeks later accepted the rent for the next month. Acceptance of rent is a waiver of a forfeiture because it recognises the lease as subsisting. *Fitzgerald v. Barbour* (1908), 17 O.L.R. 254, 257, followed.

(2) The onus of proving that the consent of the lessors was unreasonably withheld was upon the company; and, upon the evidence, the company had failed to discharge it.

(3) The company being unable to procure the lessors' assent to the assignment, their claim against G. for specific performance must fail; and G.'s claim against the company for rescission of the agreement and against the company and S. & Co. for the return of the \$3,000 must succeed. Conduct on the part of G. which led the lessors to believe that he would be an undesirable tenant afforded the company no defence to a claim for the return of money paid upon a consideration which had failed. S. & Co. were bound by the contract made by S., for good consideration, viz., the payment of the \$2,000, to repay the money. *Winter v. Dumergue* (1865-6), 14 W.R. 281, 699, followed.

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THREE actions respecting the lease of a theatre. The actions were consolidated by order of CLUTE, J., in January, 1919.

April 23, 24, 25, and 26. The consolidated actions were tried by ROSE, J., without a jury, at a Toronto sittings.

T. R. Ferguson, for Grossman.

D. L. McCarthy, K.C., for Modern Theatres Limited and Singer & Co.

H. J. Scott, K.C., and *A. W. Roebuck*, for Morris and Crooks.

May 20. ROSE, J.:—In the first action Grossman seeks the rescission of an agreement by which Modern Theatres Limited agreed to sell to him the lease of a cinematograph theatre and the return by Modern Theatres Limited and Joseph Singer & Co., their solicitors, of \$3,000 paid by Grossman to Singer & Co. as part of the purchase-price.

The second action is by Morris and Crooks, the owners of the theatre, for a declaration that the lease has become forfeited.

In the third action Modern Theatres Limited claim against the owners a declaration that consent of the owners to the assignment of the lease has been unreasonably withheld, and that the plaintiffs are at liberty to assign the lease without such consent; and, against Grossman, specific performance.

The lease in question was made to one Janke by indenture expressed to be made under the Short Forms of Leases Act. By it the theatre is demised for five years from the 1st July, 1918, at a yearly rental of \$1,800, payable monthly in advance. There is in the lease a covenant on the part of the lessee that he will not assign or sublet without leave, and there is a proviso that the leave will not be unreasonably withheld.

By deed, dated the 5th June, 1918, duly assented to by the lessors, the lease was assigned to Modern Theatres Limited.

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In November, 1918, after previous negotiation with Joseph Singer, who practises as a solicitor under the name "Joseph Singer & Co.," and who is secretary-treasurer of Modern Theatres Limited, an agreement was entered into between Grossman and Modern Theatres Limited, by which Grossman agreed to buy and Modern Theatres Limited agreed to sell the lease and the vendors' equipment in the theatre for \$5,500, payable \$1,000 down, \$2,000 "on the date of closing," and \$2,500 with interest at 6½ per cent. "in six weeks from said date." It was provided that Grossman should "take possession on the date of closing and keep an account of all moneys received by him and paid out until" he paid the \$2,500; and that the assignment of the lease should remain in the hands of Joseph Singer & Co., solicitors for the vendors, and should not take effect until the \$2,500 was paid. And it was further stipulated that, if the \$2,500 was not paid within six weeks from the date of closing, the agreement should become void, and any moneys paid should be forfeited to the vendors. Grossman also agreed to take over an existing contract between the vendors and one Coulson, by which Coulson was employed as manager of the theatre, as well as a contract between the vendors and E. D. Morris, one of the lessors, by which Morris had agreed to heat and clean the theatre.

While the contract was made in the name of Grossman, the money was being furnished by one McMillan, who was setting Grossman up in business, and who made an agreement with Grossman evidencing his ownership of the money and declaring Grossman to be a trustee of the lease for him, but providing that, when the moneys received by McMillan from the theatre business had reimbursed him his \$5,500, he would assign to Grossman one half interest in the equipment of the theatre and in future profits.

While, as already stated, negotiations for, or perhaps it would be more correct to say discussions as to, an assignment of the lease were had with Joseph Singer, the later communications were with his brother, Abraham Singer, who was in his employ, and who seems to have had charge of the office of Joseph Singer & Co. during the absence of Joseph Singer due to illness. To Abraham Singer was handed an offer dated the 2nd November, 1918, which was rejected after he had consulted Joseph Singer,

and by him was presented the document which Grossman signed, this document having been drafted by Joseph Singer. With the offer that was rejected Grossman's solicitor, Mr. W. A. Henderson, handed to Abraham Singer a cheque for \$1,000, written on a form supplied by Abraham Singer, payable to Joseph Singer & Co., which cheque was later used as the payment of the first sum of \$1,000 called for by the agreement, and similarly to Abraham Singer was handed a cheque for \$2,000, written upon a similar form, for the payment stipulated to be made "on the date of closing."

It is alleged that at the time of the handing over of the cheque for \$2,000 Abraham Singer was asked what would be done with the \$3,000 in case the lessors' consent to the assignment was not obtained, and that he stated that it would, of course, be returned. This is denied by Abraham Singer, but I think the statement was made. In making this finding I do not rely on Grossman's evidence: I still think, as I said at the trial, that he did not really understand the transaction or pay much attention to the form which it took—he says himself that he just signed what he was told to sign—and, therefore, that his evidence as to what any one said at any particular stage of the negotiations is of little value. I do, however, attach importance to McMillan's evidence, which is corroborated to some extent by Mr. Henderson's, although Mr. Henderson's recollection was not very clear, and there was some confusion in his statement as to when he issued the cheque for \$2,000—whether before or after the agreement was signed by Modern Theatres Limited—and as to other matters.

At the trial it was suggested that effect could not be given to Abraham Singer's statement that the \$3,000 would be returned unless it could be treated as a solicitor's undertaking, properly so called; but that is not the way in which the matter appears to me. I think the fact is that the time for the payment of the \$2,000 having come, and the cheque for \$1,000 being then in the possession of Joseph Singer & Co., there was asked, in effect, the question, "If we pay Joseph Singer & Co. this \$2,000, and the landlord does not consent to the assignment, and the transaction falls through, what will happen?" and that Abraham Singer, acting for Joseph Singer & Co., said, in effect, "If you pay us the \$2,000, and the transaction falls through for the cause mentioned,

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we will give you back your \$3,000," and that thereupon the cheque for \$2,000 was handed over. If that is what did happen, it is not a matter of an "undertaking" at all, but a simple contract, based on perfectly good consideration, viz., the payment of the \$2,000 to Joseph Singer & Co.; and, if the event mentioned has happened—which I shall proceed to discuss—Joseph Singer & Co. must repay the money. The statement is just the statement which one would have expected Abraham Singer to make: he was president and Joseph Singer was secretary-treasurer of Modern Theatres Limited, a company which had not even a bank-account of its own, but only a credit in the books of Joseph Singer & Co. for such balance as might be due it after deducting from moneys received by Joseph Singer & Co. any moneys paid out by them on its account.

As soon as the agreement had been signed by both parties and the cheque had been handed over, Grossman wanted to take charge of affairs at the theatre, and Abraham Singer, to take his own account of it, advised the manager, Coulson, that Grossman was going to take over the lease, had made payments on account, and would be at the theatre that evening. Grossman went to the theatre and took the management pretty much into his own hands, discharging certain employees and instructing Coulson to discharge others, and acting generally, as it seems to me, as if he was there in exercise of the right conferred upon him by the contract to "take possession on the date of closing"—which the parties seem to have understood as meaning the date of the execution of the agreement by Modern Theatres Limited—except only that he handed over the receipts each day to Coulson, who in turn took the money to Joseph Singer & Co.

A few days after Grossman's first appearance at the theatre, he and Coulson were one evening putting up a play-bill in a vacant shop adjoining the theatre, belonging to Morris, of which Coulson had the key—it having been left with him by the outgoing tenant. Morris coming by, and finding them in the shop, expressed some annoyance. He wanted to know who Grossman was, and was informed that he was taking over the lease. He seems to have called attention to the fact that the lessors' consent to any assignment was an essential, but he did not say that the consent would not be given, and he did end by giving permission, either to Coul-

son or to Grossman, to display the advertisement in his shop-window. Then Grossman complained that the theatre had not been swept in accordance with Morris's contract, and Morris said that he would speak to the janitor about it. He went away for that purpose and came back angry, the janitor having informed him that the sweeping had been done, and that the dust etc. of which Grossman complained had been made afterwards by workmen engaged by Modern Theatres Limited. He then had an interview with Grossman in the shop, at which he revoked the permission to display the advertisement, and demanded the key. Grossman refused to give up the key, and during the conversation, which seems to have become rather heated, called Morris "an old crab." Morris seems to have thought this was a very deadly insult, and threatened legal proceedings. Soon afterwards he caused the lessors' solicitor to write to Joseph Singer & Co. a letter (exhibit 14) telling them that Grossman, who claimed to be the assignee of the lease, had used abusive language, that no consent to an assignment to Grossman would be given, and that the present tenants would be held liable for the rent.

At about the end of the six weeks mentioned in the agreement, the accounts between Grossman and Modern Theatres Limited were adjusted, and an assignment of the lease, which was executed so that it could be tendered for the landlords' consent, was presented to the landlords. The consent was refused in a letter dated the 16th December, 1918 (exhibit 15), in which it was said that the landlords adhered to the position taken in the letter of the 19th November (exhibit 14), and also that Grossman had interfered with the heating of the theatre and had dismissed the engineer and forbidden him to enter the building—which he had done, without any right that I have been able to discover. I shall have to discuss the question whether the refusal was reasonable; but before doing so I ought to state my reasons for thinking that the landlords' action for a declaration that the lease is forfeited must fail.

The claim to the declaration is based alternatively upon the execution of the agreement and the taking of possession and upon the execution of the assignment. As to the first ground: although, as I have stated, Grossman did not keep the money taken in at the theatre but handed it over to Coulson for Joseph Singer & Co.,

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I incline to the opinion that he was put into possession pursuant to the term in the agreement, and that there was a breach of the covenant not to assign without leave: *McMahon v. Coyle* (1903), 5 O.L.R. 618; or that, even if there was no "assignment," there was a "setting-over" of the premises for the six weeks, which was a breach of the covenant: see the long form of lease in the Short Forms of Leases Act, R.S.O. 1914, ch. 116, schedule, item 8; but it is not really necessary to determine that point, because the lessors, after Grossman had announced that he was assignee, and after Morris had seen him and his wife in and about the theatre for some days, wrote the letter already referred to, insisting that Modern Theatres Limited should continue liable for the rent, and two weeks later accepted the rent for the next month of the term, thus, as I think, waiving the forfeiture. Mr. Scott argues that acceptance of the rent from Modern Theatres Limited is not a waiver, as it does not amount to a recognition of Grossman's right under the assignment; but that argument does not seem to me to be sound: the reason why acceptance of rent is a waiver of a forfeiture is that it is a recognition of the lease as subsisting: see *Fitzgerald v. Barbour* (1908), 17 O.L.R. 254, 257.

As to the second point: I think it is perfectly clear that the assignment was not delivered to Grossman, and that it was signed merely so that there might be something formal to submit to the landlords, and I do not see how the mere signature of the paper for such a purpose can be treated as a breach of the covenant.

In approaching the question whether the consent to the assignment was unreasonably withheld, it is to be remembered that, the lessees coming to the Court and asking for a declaration, the burden is on them to prove their case: it is not for the lessors to prove that they were justified in withholding their consent; and they are not to be held to have withheld the consent unreasonably if in the action they took they acted as reasonable persons might have acted in the circumstances: *Shanly v. Ward* (1913), 29 Times L.R. 714. It seems, also, that when a heavy rent is reserved by the lease, strong ground for refusing to consent must be shewn, as the refusal leaves the lessee under the burden of that rent: *Sheppard v. Hongkong and Shanghai Banking Corporation* (1872), 20 W.R. 459; but that consideration is not of much weight here, where the landlord is anxious to put an end to the term, and where the lease seems to be something of value.

There is little doubt that the unpleasantness that arose between Grossman and Morris on the night when the display of the poster in the shop was under discussion was the cause of the writing of the letter of the 19th November, in which it was said that no assent to an assignment to Grossman would be given. If there had been nothing but that unpleasantness, it is difficult to say whether it ought to have been held that the refusal was unreasonable: on the one hand, it has been held that a mere dislike of the proposed assignee is not a reasonable ground: *Sheppard v. Hong-kong and Shanghai Banking Corporation, supra*; on the other hand, it could scarcely be said that behaviour on the part of the assignee which indicated that he was a person with whom it would be difficult to get along amicably would not justify the landlord in refusing his consent—particularly in a case where the landlord has a contract with the tenant for services to be performed by the landlord in the building, which will bring him or his servants into daily contact with the tenant. (I have spoken throughout as if Morris was the landlord; but it is to be noted that the fact is that the legal estate is in Mr. Crooks, Mrs. Morris being the equitable owner, and Morris doing the business for her, and, although he has no title, being named in the lease as one of the lessors). I say it would have been difficult to determine whether Grossman's conduct on the evening mentioned was such as to indicate that he would be so unpleasant a person to have as tenant that the landlords would have been justified, on the strength of that incident alone, in refusing to consent to an assignment of the lease to him, for the evidence does not make it perfectly certain that the fault was all Grossman's; but Grossman's later act in undertaking to discharge Morris's janitor, coupled with what had gone before, does seem to me to make it impossible for me to hold that Modern Theatres Limited have met the onus which they have assumed of proving that it was unreasonable for the landlords to persist in their refusal to have him for a tenant.

As Modern Theatres Limited are unable to procure the landlords' assent to the assignment, their claim against Grossman for specific performance fails, and the claim made against them for the return of the \$3,000 paid must succeed: *Winter v. Dumergue* (1865-6), 14 W.R. 281; affirmed on appeal, 699; unless the fact that the landlords' refusal was probably induced by Grossman's

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conduct is an answer. There was a suggestion that Grossman, in spite of warning given by Singer after the receipt of the letter of the 19th November, persisted in a course of conduct irritating to Morris, and that he did so because he had repented of his bargain with Modern Theatres Limited, and wished to bring about a refusal by Morris which would afford him ground for claiming the return of the money paid; but there is no evidence on which it could be held that there was any such underlying motive for Grossman's conduct, and no authority was cited, and I have not found one, to support the proposition that stupid conduct on the part of the proposed assignee which leads the landlord to believe that he would be an undesirable tenant affords to the proposed assignor any defence to a claim for the return of money paid upon a consideration which has failed. *Winter v. Dumergue*, already cited, rather points in the opposite direction: see the judgment of Erle, C.J., at p. 282.

I have mentioned that the money paid really belongs to McMillan rather than to Grossman; but it was paid in Grossman's name pursuant to a contract made with him, and the persons who received it cannot be heard to object that it is not his: there is, therefore, no need to add McMillan as a party, although at the trial he expressed a willingness to be added if necessary.

There will be judgment in favour of Grossman against Modern Theatres Limited, declaring that the agreement is rescinded, and against Modern Theatres Limited and Joseph Singer & Co. for payment of \$3,000. The claims put forward by the respective plaintiffs in the second and third actions will be dismissed. The costs of the first action down to the making of the order for consolidation will be paid by the defendants to the plaintiff. In each of the other actions the costs down to the consolidation will be paid by the plaintiffs to the defendants. Modern Theatres Limited and Joseph Singer & Co. will pay Grossman's costs of the proceedings, including the trial, subsequent to the making of the order for consolidation. There will be no further order as to costs subsequent to the consolidation.

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May 22.

Mortgage—Practice in Mortgage Actions—Foreclosure—Sale—Report of Referee—Incorrect Date—Time for Redemption and for Appeal—One Day for Redemption by all Incumbrancers under Judgment for Sale—Interest—Agreement between Mortgagor and First Mortgagee for Increased Rate—Difference not Chargeable against Subsequent Incumbrancers—Consequences of Redemption or Failure to Redeem—Rules 482, 487—Stay of Reference—Appeal from Order Refusing to Stay—Rules 2, 505 (3), 507 (6).

In a mortgage action the plaintiff's claim was originally for foreclosure, and the judgment directed the ordinary proceedings for foreclosure. By an order made on the 4th March, 1919, the subsequent incumbrancers having paid \$80 into Court, it was directed that all due proceedings be had for redemption or sale instead of foreclosure. The referee made a report fixing the 27th August, 1919, as the day for redemption. The report was dated on a day in February, but was not signed until after the order of the 4th March, which order was mentioned in the report. Upon a motion to set aside the report:—

Held, that the effect of misdating the report was to shorten the time for redemption and appeal: it is imperative that all judicial acts should bear true dates.

- (2) Under a judgment for sale, the practice is different from that under a judgment for foreclosure. In the case of a sale, an incumbrancer who desires to redeem may always do so, but he is not entitled to have a separate time fixed for him to redeem: one day six months off is to be given to the original defendants to redeem the plaintiff and all other incumbrancers who have proved claims.
- (3) The plaintiff's mortgage called for interest at 5 per cent.; by an agreement between him and the mortgagor, made after the registration of the second and third mortgages, the mortgagor was to pay $5\frac{1}{2}$ per cent.; but *prima facie* this agreement gave the plaintiff no charge upon the land for the additional one-half per cent. as against the subsequent mortgagees.
- (4) It is unnecessary to insert in the report any statement as to what will follow upon redemption or failure to redeem: Rules 482, 487.
- (5) There is no stay of proceedings as the result of an appeal from a refusal to stay: Rules 2, 505 (3), 507 (6).

MOTION by the defendants by way of appeal from and to set aside the report of CAMERON, Official Referee, dated the 27th February, 1919, upon a reference in a mortgage action.

April 30. The appeal was heard by MIDDLETON, J., in the Weekly Court, Toronto.

H. J. Scott, K.C., for the defendants.

A. C. Heighington, for the plaintiff.

May 22. MIDDLETON, J.:—The report bears an incorrect date. There is evidence upon the face of the report that it was not signed till after the order mentioned in it of the 4th March, 1919. Yet the time for redemption mentioned is the 27th August,

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1919. The effect would be to shorten the time for redemption and the time for appeal. It is imperative that all judicial acts should bear true and not false dates—particularly is this so when the rights of parties depend upon the date.

2. The report is wrong in form. It is not, as was said upon the argument, in accordance with the regular form used in the Master's office, but departs from it in the vital matter to be mentioned.

The action originally was for foreclosure, and the judgment directs the ordinary proceedings for foreclosure; but, by the order of the 4th March, 1919, the subsequent incumbrancers having paid into Court \$80 to secure a sale of the lands, it is ordered that all due proceedings be had for redemption or sale instead of foreclosure.

Under the practice in Ontario, as found in the very accurate notes by Mr. Hoyles in Taylor & Ewart's Judicature Act and Rules, Appendix, p. [228]: "Under a decree for a sale one day six months off is to be given to the original defendants to redeem the plaintiff and all other incumbrancers who have proved claims."

This differs from the practice in foreclosure, where "a day six months from the date of report is to be given to the first incumbrancer to redeem the plaintiff. On default being made and a final order" (as to him) "being obtained, the next incumbrancer is given a day three months" (now one month—see Rule 489*) "from date of taking account to redeem plaintiff, and so on until all the incumbrancers entitled to redeem have been foreclosed, when a day should be given the mortgagor to redeem."

The reason for this distinction is obvious. When a sale is sought the owner is given his chance to redeem, and, failing this, the sale goes on. The case when foreclosure is sought is quite different. Each incumbrancer, in order, must be given his right to redeem, and the owner can redeem only when those to whom he has given his right to redeem decline to do so.

In the case of a sale, an incumbrancer who desires to redeem may always do so, but he is not entitled to have a separate time fixed for him to redeem. The consequence of his failure to redeem the plaintiff is not his foreclosure, but his being compelled to

*489. In mortgage actions the period allowed for redemption in the first place shall be six months and when it becomes necessary to fix a day for redemption after the lapse of the first period the further time allowed shall be one month.

resort to the proceeds of the land after the plaintiff's claim is first satisfied. This is not unjust, because he took his security subject to the plaintiff's right to sell upon default.

(3) The mortgage calls for 5 per cent. interest; by an agreement made after the registration of the second and third mortgages, the mortgagor agreed to pay $5\frac{1}{2}$ per cent.

Primâ facie this gives the plaintiff no charge upon the land for the higher rate of interest against these mortgagees. It is said, but not shewn, that these mortgagees were parties to this new arrangement, and the plaintiff on the reference back should have a chance of giving further evidence on this.

If the owner is bound to pay more than the mortgagees subsequent to the plaintiff, the exact situation should be made plain by a special finding.

(4) It is not necessary to insert in the report any statement as to what will follow upon redemption or failure to redeem. See Rules 482 and 487.*

(5) There is not, in my opinion, any stay as the result of an appeal from a refusal to stay. The Judge before whom the appeal came might have directed a stay pending his disposition of the appeal—failing that, there is none. See Rules 505 (3) and 507 (6) and Rule 2.†

(6) The report should be set aside, and the defendants should have the costs of this motion in any event.

*482. Subject to the provisions of the Mortgages Act, upon payment of the amount found due, the mortgagee shall, unless the judgment otherwise directs, assign and convey the mortgaged property to the party making the payments, or to whom he may appoint, free and clear of all incumbrances done by him, and shall deliver up all deeds and writings in his custody and power relating thereto.

487. In a redemption action, on default of payment being made according to the report, the defendant shall be entitled, on an *ex parte* application, to a final order of foreclosure against the plaintiff, or to an order dismissing the action with costs to be paid by the plaintiff.

†505. . . . (3) The appeal shall not be a stay of proceedings unless ordered by a Judge or by the officer whose decision is complained of.

507. . . . (6) No appeal under this Rule shall be a stay of proceedings unless so ordered by a Judge.

2. All Rules and Orders heretofore passed are rescinded, except those mentioned in the schedule hereto, and as to all matters not provided for in these Rules, the practice shall be regulated by analogy thereto.

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[APPELLATE DIVISION.]

May 30.

CANADA CYCLE AND MOTOR CO. LIMITED v. MEHR.

Contract—Sale of Goods—Construction of Written Agreement—Buyer's Agreement to Take Seller's Scrap for one Year at Specified Prices—Implied Agreement of Seller to Furnish Scrap—Damages for Breach.

By a contract in writing the defendants agreed "to take the accumulations of scrap" from the plaintiffs, "for a period of one year," at prices specified:—*Held* (MEREDITH, C.J.C.P., dissenting), that, although there was nothing in the writing binding the plaintiffs to sell to the defendants "the accumulations of scrap . . . for a period of one year," the agreement to do so was implied, and the defendants were entitled to recover damages for breach of that agreement.

Churchward v. The Queen (1865), L.R. 1 Q.B. 173, followed.

The Queen v. Demers, [1900] A.C. 103, distinguished.

Per MEREDITH, C.J.C.P.:—A buyer may agree to buy without a seller being bound to sell; and that was the contract in this case. Taking the views expressed in the *Churchward* case as laying down the principle applicable to this case, the Court ought to be extremely cautious before concluding that the parties intend more than they express; and there should be not only "extreme caution," but "necessity" and "manifest intention." No judgment in the defendants' favour could be given without disregard of all these.

AN appeal by the plaintiffs from the judgment of CLUTE, J., at the trial, in favour of the defendants upon their counterclaim.

On the 12th April, 1917, the defendants agreed "to take the accumulations of scrap" from the plaintiffs, for one year from that date, at certain stated prices.

The agreement was in a peculiar form. It was headed "Contract," and read, "J. Mehr & Son hereby agree to take," etc., but was signed by the plaintiffs. The defendants, regarding it as a proposal by the plaintiffs, wrote "Accepted" under it, and signed it "J. Mehr & Son."

Under this agreement, the plaintiffs delivered to the defendants 10 car-loads of scrap. The last delivery was on the 27th August, 1917. On the 25th September, 1917, the plaintiffs notified the defendants that no more accumulations of scrap would be supplied.

The plaintiffs brought this action for \$1,870.51, the balance due on the scrap delivered. The defendants counterclaimed for damages for breach of the agreement.

On the 2nd October, 1918, judgment was entered for the plaintiffs for the amount of their claim, and execution thereon was stayed until after the trial of the counterclaim.

The counterclaim was tried by CLUTE, J., on the 27th February, 1919. It was then adjudged that the defendants were entitled to damages, and a reference was directed to ascertain the amount, further directions and costs being reserved.

The plaintiffs' appeal was from this judgment.

April 30. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

Shirley Denison, K.C., for the appellants, argued that the memorandum was not a contract binding in law on them, but was a standing offer which became binding only as and when the plaintiffs delivered and the defendants accepted accumulations of scrap. As there was no contract, there could be no breach. This was the single question in the case. He referred to *The Queen v. Demers*, [1900] A.C. 103; *Hill v. Ingersoll and Port Burwell Gravel Road Co.* (1900), 32 O.R. 194; *National Malleable Castings Co. v. Smiths' Falls Malleable Castings Co.* (1907), 14 O.L.R. 22; *Great Northern R.W. Co. v. Witham* (1873), L.R. 9 C.P. 16; *Greenberg v. Lake Simcoe Ice Supply Co.* (1917), 39 O.L.R. 32.

G. S. Hodgson, for the defendants, respondents, contended that there was a binding contract on the part of the appellants. The respondents were bound to buy and the appellants were bound to sell. The obligation to sell must be implied from the obligation of the appellants to buy: *Churchward v. The Queen* (1865), L.R. 1 Q.B. 173, at p. 211; *Moon v. Mayor etc. of Camberwell* (1903), 89 L.T.R. 595; *In re Gloucester Municipal Election Petition*, [1901] 1 K.B. 683; *Pordage v. Cole* (1670), 1 Wms.' Saund. 548 (1 Saund. 319 h); *Wood v. Copper Miners' Co.* (1849), 7 C.B. 906. The *Demers* case is distinguishable.

Denison, in reply, referred to *Drake v. Vorse* (1879), 52 Ia. 417; *Houston and Texas Central R.W. Co. v. Mitchell* (1873), 38 Tex. 85; *Halsbury's Laws of England*, vol. 7, p. 346.

May 30. LATCHFORD, J.:—On the 12th April, 1917, the plaintiffs sent to the defendants the following document:—

“Contract. April 12th, 1917.

“Between Canada Cycle and Motor Co. Limited and J. Mehr & Son, Toronto, Ontario.

“J. Mehr & Son hereby agree to take the accumulations of

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scrap from the Canada Cycle and Motor Company Limited for a period of one year from this date, that is, until April 12th, 1918, the prices to be as follows:—

“No. 1 heavy meltings steel at \$16 per g.t.

“Light steel at \$7.50 per g.t.

“Bicycle turnings at \$7.75 per g.t.

“F.O.B. Canada Cycle yards at Weston.

“Loading to be by J. Mehr & Son.

“Canada Cycle & Motor Co. Limited

“R. A. Bell, purchasing agent.”

While in form—apart from the signature—a proposal by the defendants to the plaintiffs, this document is in fact a proposal by the plaintiffs to the defendants, and was so regarded by both the parties.

The defendants wrote “Accepted” under the proposal, and signed it “J. Mehr & Son.”

Under the contract so formed, the plaintiffs delivered to the defendants 10 car-loads of scrap of the descriptions stated, the last delivery being on the 27th August.

On the 25th September, the plaintiffs notified the defendants that no more accumulations of scrap would be supplied.

In the meantime, two employees of the Russell Motor Company, the parent company of the plaintiffs, were convicted of having accepted bribes from the defendants. The two members of the defendants’ firm were also prosecuted for having bribed the convicted employees, but were acquitted.

Mr. Denison did not, at the trial or upon this appeal, contend that the plaintiffs can base their refusal to make further delivery on whatever took place between the defendants and the employees of the Russell Motor Company. His contention was and is that the plaintiffs were not bound by the contract to do more than sell to the defendants, at the prices stated, such scrap as, during the period of one year from the 12th April, 1917, the plaintiffs chose to deliver to them.

When the plaintiffs brought this action for \$1,870.51, the balance due on the scrap delivered prior to the 27th August, the defendants counterclaimed for damages for breach of the agreement. Judgment was entered in the plaintiffs’ favour, on the 2nd October, 1918, for the amount of the claim, and execution stayed until the trial of the counterclaim.

The trial was had on the 27th February, 1919, when it was adjudged that the defendants were entitled to damages for breach of the contract, and a reference was directed to ascertain the amount, further directions and costs being reserved.

From this judgment the plaintiffs now appeal. They contend that they were not bound to deliver all or any of their accumulations of scrap to the defendants, but only such as they thought proper. "The defendants," they say, "were obliged to purchase all the scrap of the specified descriptions which were delivered to them, but we had not bound ourselves to deliver any scrap to them."

This contention failed before the learned trial Judge, and fails, in my opinion, on this appeal.

The agreement created by the defendants' acceptance of the plaintiffs' proposal is what the plaintiffs called it—a "contract." On the part of the defendants it was a contract to purchase from the plaintiffs the plaintiffs' accumulations of specified scrap produced in their works at Weston during a period of one year.

The case appears to me clearly to fall within the class referred to by Cockburn, C.J., in *Churchward v. The Queen*, L.R. 1 Q.B. 173, at p. 195: "Although a contract may appear on the face of it to bind and be obligatory only upon one party, yet there are occasions on which you must imply—although the contract may be silent—corresponding and correlative obligations on the part of the other party in whose favour alone the contract may appear to be drawn up. Where the act done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, you would there imply a corresponding obligation to do the things necessary for the completion of the contract. . . . If A covenants or engages by contract to buy an estate of B, at a given price, although that contract may be silent as to any obligation on the part of B to sell, yet as A cannot buy without B selling, the law will imply a corresponding obligation on the part of B to sell: *Pordage v. Cole*, 1 Saund. 319 h."

Care must of course be taken, as is pointed out in *Churchward v. The Queen*, *supra*, and *Hill v. Ingersoll and Port Burwell Gravel Road Co.*, 32 O.R. 194, that a term be not implied which is contrary to what, as may be gathered from the whole terms and

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tenor of the contract, was the intention of the parties. In the present contract, the intention that the plaintiffs shall sell is, to my mind, as clearly implied as the intention that the defendants shall buy is clearly expressed.

The case of *The Queen v. Demers*, [1900] A.C. 103, is relied on by the plaintiffs. In that case an order in council was passed on the 27th January, 1897, authorising the execution by the Secretary and Registrar of the Province of Quebec of a contract with Demers for the printing and binding during a period of 8 years from the 1st January, 1897, of certain official publications, at stipulated prices. On the 27th February, the Legislative Assembly was dissolved, and in the elections which took place on the 11th May the Government was defeated. In the meantime, on the 18th March, the contract was executed; but, in the confusion of the electoral campaign, an order in council, contemplated by the prior order as requisite to confirm the contract, was not passed before the Government resigned. The new Administration, which took office on the 28th May, passed an order in council cancelling the contract, after the 30th June—the close of the Province's fiscal year. Notice of cancellation was given to Demers. The work done by him up to the 30th June was paid for at the prices stated in the contract. Demers protested, insisting that the Government was bound to give him its printing and binding for the unexpired portion of the 8 years. The Government had more consideration for other journalists than for the editor of *L'Evenement*, and made a new agreement with Ernest Pacaud. Demers then instituted proceedings by petition of right claiming damages for breach of contract. He was successful to a varying but, to him, satisfactory extent in the Superior Court and in the Court of Queen's Bench. In both Courts constitutional questions of interest were raised. The validity of the contract was impugned on the ground that it had not been confirmed as contemplated by the order in council of the 27th January. In the Privy Council their Lordships did not deal with any such matters, but proceeded on the assumption that the contract was valid.

Lord Macnaghten, who delivered the judgment of the Judicial Committee, lays down no principle of law applicable to the present or any other case, and he refers to no authority of general application. His observations apply only to the particular contract that

was in question. All he finds in it is an undertaking on the part of Demers to do certain work at specified rates. For work so done the Government was bound to pay according to the agreed tariffs. But there was nothing in the contract binding the Government to give to Demers all or any of the printing work referred to in the contract, or preventing it from giving the whole or any part of the work they saw fit to other printers. Their Lordships therefore decided that Demers had not shewn any breach on the part of the Government, and allowed the appeal. It was manifestly considered that, like Churchward, Demers had founded his case upon the assumption of a covenant to be implied from the terms of the contract—a covenant which, according to sound and reasonable rules of construction, could not be implied.

One of such rules is that the considerations which determine the construction of an agreement with a great department of the public service, or of a formal contract containing stipulations on both sides in which each party proposes to state in plain language what obligations he means to undertake, differ materially from those which are applicable to ordinary contracts for work or labour (Mellor, J., in the *Churchward* case, L.R. 1 Q.B. at p. 204, and Lush, J., at p. 211), or, it may be added, to informal agreements such as that made between the Mehrs and the plaintiffs.

I think the appeal should be dismissed—and with costs.

BRITTON, RIDDELL, and MIDDLETON, JJ., agreed with LATCHFORD, J.

MEREDITH, C.J.C.P.:—The only question involved in this appeal is, whether the judgment in the defendants' favour upon their counterclaim in the action ought to stand. That counterclaim is one for damages for breach of an alleged contract on the part of the plaintiffs to sell to the defendants all "the accumulations of scrap" from the plaintiffs' works for a period of one year at prices agreed upon.

Both claim and counterclaim were based upon a short and plain contract in writing in these words (setting out the contract as above).

No other agreement is alleged on either side, and there is no suggestion that this agreement should or could be reformed in

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any way; or that it does not set out accurately the whole transaction between the parties. The writing was drawn by the plaintiffs, and was submitted to, and in due course approved of, by the defendants, and thereupon made final and binding by the defendants' signature.

Obviously there is no contract in the writing such as the defendants allege; and, if the words which the parties used are given their plain meaning, the counterclaim should have been dismissed. All are agreed in that.

The single ground upon which the counterclaim is supported is: that, as the defendants were bound to buy, it must be assumed that the plaintiffs were equally bound to sell; and so the plaintiffs must be held liable upon the counterclaim upon that which is commonly called an implied contract. It is said that a buyer cannot buy unless a seller sells, which of course is true, necessarily so; but it is equally true, although of much less common occurrence, that a buyer may agree to buy without a seller being bound to sell, or a seller agree to sell without a buyer being bound to buy. We must not let our minds be carried away or prejudiced by want of experience in such things or by experience altogether of one character only.

It is, it need hardly be said, a strong assumption of power for any Court to add to or take from a contract deliberately entered into and put in writing in plain words by persons having infinitely better knowledge of the things dealt with in the contract and persons quite as capable as any of us of putting their agreement in plain words; it should be only necessity that justifies such a thing, though doubtless with many there is sometimes if not always an overpowering notion that they could and should make it a better contract or will or other writing, though entirely ignorant of, it may be, the causes of making it just as it is. It is far safer and far better to give effect to it as it is than in any manner to endeavour to give effect to it as it may seem to us it should be.

The case of *Churchward*—*Churchward v. The Queen*, L.R. 1 Q.B. 173—is the leading case, in modern times, upon the subject, and one in which the subject is very fully dealt with, and one which seems to be mainly relied upon in support of the counterclaim. I shall therefore be content to take the views expressed by the several Judges who considered that case, as laying down

the principle applicable to this case. The Lord Chief Justice in that case expressed the principle in these words (p. 194):—

“But then, on the part of the suppliant, it is alleged that, although there may be no such covenant or undertaking expressed, it must necessarily be implied from the terms and tenor of the contract itself; and it appears to me that that is *the* question, and the *only* question, which we are called upon to determine.”

And afterwards (p. 195) he remarked upon the great care that should be taken before making a contract speak where the parties had left it silent.

The rule as stated by Mellor, J. (p. 202), was, that “all that must necessarily be implied” from the scheme of the instrument and the expressions used in it might be taken into consideration in ascertaining the meaning and intention of the parties; and as to the case under consideration he put the test thus (p. 204):—

“Unless we can see our way to the conclusion that there must necessarily be implied . . . a contract that they will send these mails for a period of eleven years, the argument for the suppliant fails.”

And Lush, J., dealt with the subject in these words (p. 211):—

“In dealing with formal contracts containing stipulations on both sides, in which each party professes to express in plain language what obligations he means to undertake, I think the Court ought to be extremely cautious before they arrive at a conclusion that the parties intended more than they expressed. In order to raise what is called an ‘*implied*’ covenant, I apprehend the intention must be manifest to the judicial mind, and there must be also some language, some words or other, capable of expressing that intention—not that any formal technical phraseology is required, but you must find words in the instrument capable of sustaining the meaning which you seek to imply from them.”

That case therefore makes these things essential: “great care” or “extreme caution,” “necessity,” and “manifest intention;” and I cannot but think that no judgment in the defendants’ favour can be given without disregard of all these. But for contrary opinions I should have been inclined to say that a judgment in the defendants’ favour could have no firmer foundation than that of a “guess,” and that if we really knew all that the parties to this

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action knew about each other and about the subject-matter of their contract we might deem it not a very good one.

In the first place, it is a mistake to treat the transaction in question as one of bargain and sale of an existing article and then to apply the law applicable to such a case: a very misleading mistake, perhaps easily fallen into. The contract was, as the parties plainly and accurately put it, "to take the accumulations of scrap" from the plaintiffs' premises; a thing that was necessary in order that they might carry on their business conveniently, whether the scrap was worthless or valuable; it is a common need in very many businesses, the most generally observed being perhaps the businesses of livery stable keepers. In some instances, and at some times, it may occasion outlay only, in others it may bring income; but one thing is always needed in making contracts for the removal of accumulations, and that is, that the contractor should be an honest man, and another that the owner of the property should have power to discharge him: having the right of entry upon the property and about the premises, great opportunity for dishonest gain is in the contractor's way; hence the need for control of the situation by the owner. It is easy to say, "But you can discharge a dishonest man, you are not bound to keep him on;" that, however, has more of the judicial than the practical in it; you cannot always catch a dishonest man; and it is sometimes costly to charge one with theft, however guilty he may be, if his guilt cannot be proved in a court of law. The plaintiffs are a large manufacturing concern; shrewd and capable officers conduct their affairs; the defendants are buyers of "junk;" and events happening subsequent to the making of the contract prove that, if the plaintiffs made the contract which it is said the Court should by implication fasten upon them, those shrewd, capable men were inexcusably neglectful of their duties to their employers: what excuse could they give if really they made a contract, with those, now proved to be, dishonest men, which gives a right of entry upon the plaintiffs' property with the right to compel the plaintiffs to allow them to take away all the scrap from their works. My implication is, that these officers were right, and that if we impose upon the plaintiffs a contract binding for a year the wrong is done by us. There was no neglect, no

madness, in the manner in which the contract was drawn; it was drawn as it is so that, without charge of dishonesty, without giving reason of any character for so doing, the dealings between the parties might be brought to an end by the plaintiffs at any time. And there was no reason why the defendants should not accept such a contract; they knew the character of the great concern they were dealing with; knew that as long as they fulfilled their part of the contract satisfactorily and honestly there was no danger of any discontinuance of the arrangement; they were mere traders in junk, not manufacturers, nor had they any interest in the scrap except the profit they might make on a resale of it; they went to no expense and lost no time in preparation for carrying out the contract; the discontinuance of the trading merely ended their profit or loss on the "scrap," and relieved them from the work of removing it; and it was worth a great deal to them to secure such a customer which with honest dealing on their part was almost sure to bring to them long-continued profitable business. On the other hand, it was but common prudence on the part of the plaintiffs to have some one bound to take away the accumulations; that it should not be open to the defendants to leave those obstructions upon the plaintiffs' property whenever it might suit their convenience to discontinue removing them.

The fact that the writing has the word "Contract" at its head does not at all help the defendants; it is a contract, but a contract to which they want a further contract added by implication for their benefit.

Nor does the case of *Dr. Pordage—Pordage v. Cole*, 1 Saund. 319 *h*—upon which the defendants rely, help them; it is, on the contrary, distinctly against them. The writing there in question sets out that Pordage and Cole had agreed that Cole should give the doctor \$775 for all the doctor's lands and some goods, all particularly described in the writing, which purported to have been sealed by both of them. The Court held that each party had a mutual remedy against the other, for the word "agreed" was the word of each, but that it might be otherwise if it had been the word of the defendant only. In this case it is the word of the defendants only—"J. Mehr & Son hereby agree;" but really how could that case, on any ruling, govern one so different from it as this is?

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Upon the parties' own-chosen words, upon the law, upon the cases, and upon that which seems to me to be the common sense of the matter, I am in favour of allowing the appeal and directing that the counterclaim be dismissed.

Appeal dismissed (MEREDITH, C.J.C.P., dissenting).

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[APPELLATE DIVISION.]

May 30.

SCOTLAND V. CANADIAN CARTRIDGE CO.

Master and Servant—Claim for Injury to Health of Servant Working in Factory—Rejection of Claim by Workmen's Compensation Board—"Personal Injury by Accident"—Workmen's Compensation Act, 5 Geo. V. ch. 25, sec. 3 (1)—Finality of Conclusion of Board—Sec. 15 of Act (5 Geo. V. ch. 24, sec. 8)—Action for Damages for Injury—Findings of Jury—Evidence—Onus—Absence of Ventilation—Presence of Poisonous Vapours—Proximate Cause of Ill-health—Failure of Proof.

A workman sued his employers to recover damages for injury to his health, caused, as he alleged, by neglect of their duty to him as their servant, while he was working for them in their ammunition factory. The duty alleged by the plaintiff was to ventilate the building where the plaintiff worked in such a manner as to keep the air reasonably pure so as to render harmless, as far as reasonably practicable, vapours generated in the course of the work; the breach alleged was the neglect of that duty; and the consequence was the emission of poisonous gases, which, owing to the absence of ventilation, permanently injured the plaintiff's health. The gases were alleged to have arisen from small tanks into which hot metal, in the process of manufacture into ammunition-shells, was dipped in a solution of prussic acid and a solution of sulphuric acid. At the trial of the action the jury found: that harmful gases were so generated—"the three fumes of gases combined sulphuric acid, cyanide of potassium, and natural gas;" that the building was not ventilated in such a manner as to keep the air reasonably pure and so render the gases harmless as far as reasonably practicable; that the conditions of the factory where the plaintiff worked caused his present and possibly future disability; that the injury complained of by the plaintiff was caused by the defendants' negligence; that the negligence was, "sufficient ventilation was not provided while the plaintiff worked there;" and that the plaintiff was not guilty of contributory negligence:—

Held, that the Ontario Workmen's Compensation Act, 4 Geo. V. ch. 25, did not stand in the way of the action: the plaintiff's claim was twice before the Workmen's Compensation Board, and was rejected on the ground that, if it could be supported in fact, it would not be a case of "personal injury by accident" (sec. 3 (1) in Part I. of the Act), and so could not be one within the Act; and, whether that conclusion was right or wrong, it was made final and conclusive by sec. 15 of the Act, as enacted by sec. 8 of the amending Act 5 Geo. V. ch. 24.

The action failed because there was no evidence upon which reasonable men could find in the plaintiff's favour.

The onus was upon the plaintiff to prove (1) absence of ventilation, (2) the presence of poisonous vapours, and (3) that the two combined were the proximate cause of the plaintiff's ill-health; and he had succeeded in shewing none of the three.

APPEAL by the defendants from the judgment of CLUTE, J., upon the findings of a jury, in favour of the plaintiff, in an action to recover damages for injury to the plaintiff's health by his being compelled to breathe gas-fumes while at work for the defendants in their munitions factory, in a room said to be without ventilation.

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May 13. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

Strachan Johnston, K.C., and *H. A. Burbidge*, for the appellants, argued that the claim was barred by sec. 15 of the Workmen's Compensation Act, 4 Geo. V. ch. 25, as enacted by sec. 8 of the amending Act 5 Geo. V. ch. 24*. If not, and if there was a right of action at common law, then the jury's finding of negligence was so unreasonable that it should not be sustained.

W. S. MacBrayne, for the plaintiff, respondent, said that the plaintiff had thought that he had a case within the Workmen's Compensation Act, and had gone to the Board with it; but the Board concluded that it had no jurisdiction. The plaintiff therefore relied upon his common law right to redress: *Lamontagne v. Quebec Railway Light Heat and Power Co.* (1914), 50 Can. S.C.R. 423, at p. 427, 22 D.L.R. 222. The verdict, on the evidence, should be sustained.

May 30. The judgment of the Court was read by MEREDITH, C.J.C.P.:—This action was brought by the plaintiff, a workman, to recover from the defendants, his employers, \$5,000 damages for injury to his health, caused, as he alleged, by neglect of their duty to him as their servant while he was working for them in their ammunition factory, at Hamilton, from the month of October, 1916, until the month of February, 1917. The action was begun

*Part I. of the Workmen's Compensation Act deals with "Compensation." Section 15, as enacted by the amending Act, is as follows:—

15.—(1) The provisions of this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependants are or may be entitled against the employer of such workman for or by reason of any accident happening to him on or after the first day of January, 1915, while in the employment of such employer, and no action in respect thereof shall lie.

(2) Any party to an action may apply to the Board for adjudication and determination of the plaintiff's right to compensation under this Part, or as to whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive.

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on the 27th May, 1918: and was based upon an alleged breach of duty under the "common law," and also under the Factories Act: at the trial an amendment was allowed, and made, extending the claim to one under the Public Health Act also.

The duty alleged by the plaintiff throughout was to ventilate the building in which the plaintiff worked in such a manner as to keep the air reasonably pure so as to render harmless, as far as reasonably practical, vapours generated in the course of the work done there: the breach alleged was a neglect of such duty; and the consequence was the emission of strong, irritating, and poisonous gases, which, owing to the absence of such ventilation, permanently injured the plaintiff's health.

The "gases," or "fumes" as they were generally called throughout the trial, were alleged to have arisen from small tanks into which hot metal, in the process of manufacture into ammunition shells, was dipped in a solution of prussic acid and a solution of sulphuric acid.

In order to succeed in the action it was therefore necessary for the plaintiff to prove: that such vapours or fumes did arise from such tanks; that so arising they were injurious to health; that the defendants were guilty of a breach of duty to ventilate the building; and that the plaintiff's health was injured, and to what extent, by such vapours, by reason of such absence of ventilation.

The case was tried by a jury, who found: that harmful gases were so generated, "the three fumes of gases combined sulphuric acid, cyanide of potassium, and natural gas;" that the building was not ventilated in such a manner as to keep the air reasonably pure and so as to render harmless so far as reasonably practicable all gases, vapours, or other impurities generated in the course of the manufacturing process carried on by the defendants while the plaintiff was in their employment; that the conditions of the factory where the plaintiff worked caused his present and possibly future disability; that the injury complained of by the plaintiff was caused by the defendants' negligence; that the negligence was, "sufficient ventilation was not provided while the plaintiff worked there;" and that the plaintiff was not guilty of contributory negligence: and they assessed the plaintiff's damages at \$3,500 under the common law, and at \$3,664.44 under the Factories Act.

The assessment at the greater sum under the Act seems to have arisen from the fact that the jury did not understand that compensation only could be given, that the limitation provided in the Act was the maximum, that no more could be awarded, nor could more than the loss be awarded if it were less than the maximum: however, judgment was properly directed to be entered for the lesser sum, and that is not now objected to.

The next preliminary matter which arises is involved in the question: why is this case here, why is the claim not one for the Workmen's Compensation Board? The answer is: that it was twice before that Board, and was rejected as one not within the provisions of the Workmen's Compensation Act. It appears, however, that on both occasions the claim was entertained by the Board, and that one of its members went to the building and inspected it and was satisfied that it was well-ventilated; and that a medical referee was appointed under sec. 22 of the Act, and that he made a thorough examination of the plaintiff, and from such examination was satisfied and certified to the Board that the man was suffering from diseases of long standing which were in no way connected with his employment by the defendants: but the Board rejected the claim on the ground that, if it could be supported in fact, it would not be a case of "personal injury by accident" (sec. 3 (1) in Part I. of the Workmen's Compensation Act), and so it could not be one within the Act; and, whether that conclusion was right or wrong, it is made final and conclusive by sec. 15 of the Act, as enacted by sec. 8 of an Act to amend the Workmen's Compensation Act, 5 Geo. V. ch. 24. Therefore the Act does not stand in the way of this action.

And the only ground upon which this appeal can be allowed is: that there was no evidence upon which reasonable men could find in the plaintiff's favour; and, if that be so as to any one of the essential findings, the defendants should have judgment dismissing the action notwithstanding the verdict.

The action is one of a somewhat unusual character: one giving rise to questions with which jurors, and Judges too, are likely to be unfamiliar, questions of a more or less scientific and difficult nature; and necessarily a case in which the onus of proof resting on the plaintiff is a difficult one: proof of absence of ventilation; proof of the presence of poisonous vapours; and proof that the

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two combined were the proximate cause of the plaintiff's ill-health; and also proof of the amount of damages.

Yet little effort seems to have been made to prove some of these things. Let us deal with them in the order in which I have just stated them.

Instead of calling some competent witness to prove defective ventilation, the plaintiff based his case mainly on the testimony of a foreman of the work in which he had been employed; but a man with no special knowledge and a man who had been discharged by the defendants from their employment on the complaint of some of the men under him. There may, of course, be sufficient proof without the testimony of those who have studied the subject or learned from experience: there may be proof from circumstances alone. But the mere fact that the plaintiff worked in the building, and ever since has been in ill-health, is not proof; that other workmen complained is not proof. The men were working from 6.30 in the morning till 6.30 in the evening, with only a half-hour's intermission for dinner: they were so working in order to make extraordinary wages and to help to fill the urgent need of ammunitions. In such circumstances, more than the usual indispositions were sure to occur, and there are always more or less.

Then, against this somewhat haphazard proof, the defendants called first the member of the Workmen's Compensation Board who inspected the building, upon the plaintiff's claim made under the Act, in September, and he described, in evidence at the trial of this action, the ventilation as "splendid ventilation," at the time of his inspection. Their next witness was a consulting engineer of over 20 years' experience, and he firmly testified to the sufficiency of the ventilation, describing the building as a typical modern mill building, which, from the character of its construction, ventilates itself. He also made it plain that a hood over the tanks, as suggested by the discharged foreman, would afford no protection to any one working where and as the plaintiff was. This witness was followed by a building contractor, who had had 7 years' experience as a construction engineer, and was a Bachelor of Applied Science of the McGill University. He described the ventilation in question as good, and added that he did not believe it could be improved on in a building of that kind. And lastly a

number of workmen and officers of the defendant company also testified to the sufficiency of the ventilation; the latter also testifying to the usual inspections, by provincial officers under the Factories Act, of the building, without fault having ever been found with it.

Having regard to the onus of proof, I am of opinion that the plaintiff did not prove any *prima facie* case of neglect of duty towards him in this respect.

Upon the next vital question—proof of the presence of poisonous vapours—the plaintiff's case was even more halting. Not a witness was called having any knowledge of the subject; and the circumstances, upon which only any contention in the plaintiff's behalf can be made, really proved nothing. All the symptoms of illness of the plaintiff deposed to were, by all the physicians, stated to be symptoms of a common, everyday character that may arise from any one of many common ailments; they proved nothing: nor did the fact that out of place prussic and sulphuric acids might be virulent poisons, though it may well be that some jurors might wrongly consider it conclusive against the defendants. And here again the defendants supplied the proper evidence. It was obtained from a witness, a chemist and chemical engineer, who was in the employment of the Government of the United States of America, as inspector of the making of munitions. His testimony, briefly stated, was that no poisonous gases could come from the tanks because of the dilute character of the solution; and in cross-examination, on questions framed so as to elicit such answers, said the effect of the solutions, as to poisoning by gases, would be just about the same as a glass of water: that the tanks were, so far as poisoning by inhalation went, absolutely harmless; and that if the plaintiff got sick there it must have been from some other cause: and he gave fully, in cross-examination, the reasons why that was so.

In this connection it should be stated that the jury—without knowledge of the subject—rejecting the whole testimony added natural gas as a poison which contributed to the plaintiff's injury.

No attempt was made to controvert this evidence: and, obviously, nothing is gained by relying on the proof of the pudding until there is proof that it was eaten: proof of consequences will not help if that which was eaten was really something else.

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In these circumstances, no other conclusion can be reached by me than that reasonable men could not find, upon the evidence alone, that the plaintiff was injured by poisonous vapours arising from these tanks: though reasonable men might be led by their impulses to do so: but verdicts cannot stand upon generous impulses, and are not commendable from any point of view when they cost the impulsive nothing, when they put the burden upon others who have done no wrong. Therefore, on this ground also, in my opinion, the action failed and should have been dismissed at the trial.

The third ground presents also a formidable obstacle in the plaintiff's way to success in this action. Was there any evidence upon which, even if it had been proved that the tanks did emit poisonous vapours, reasonable men could find that such vapours were the proximate cause of the plaintiff's ill-health?

The man testified that he had always, before going to work in this building, been in good health; but he admitted that his discharge from military service in Canada a few months after he entered it purported to be a discharge because of physical disability, and surgical photographs—"X rays"—taken by the medical referee demonstrated to him that the man had long suffered from rheumatism affecting the bones of the spine and had been tuberculous.

But, for the plaintiff, three physicians were of opinion that his state of health at the present time and ever since he left the defendants' employment was caused by the vapours of prussic acid or sulphuric acid—one condemning the prussic acid only. All of these physicians were examined as witnesses before the expert in chemistry witness was called; and none of them was confronted with it; nor was any attempt made to recall them in view of it. None of them professed to have any special knowledge in chemistry or toxicology, indeed the most emphatic of them in support of the plaintiff was also most emphatic in asserting his lack of knowledge of poisons and their effects. And all three admitted that the man's symptoms of disease were common symptoms that might arise from any of many ordinary causes—that there was no distinctive symptom; that without the man's statement of the cause of his ailments they would be without the groundwork of their opinions: that they never went to test the

tanks or see the building, and that they had to rely altogether upon the man's "history" of his ailment and its causes: but that what they saw, and what they were told accorded with the conclusion reached by them. One only of them professed to have seen another case of such poisoning; but even in that case it depended, just as this case does, on his own diagnosis only, and so cannot be treated as an authenticated case. If the plaintiff really thought he had a good case against these defendants, it is extraordinary that he did not call as a witness some one who had some knowledge of and experience in such cases.

For the defence the medical referee before mentioned testified, with much confidence apparently, that the plaintiff's ill-health was not at all attributable to poisoning by prussic or sulphuric acid, but that he was suffering from long standing bacterial diseases, osteo-arthritis—chronic rheumatism affecting the bones—and pleurisy, which he thought "was an old tuberculosis;" and he testified that this was demonstrated by the photographs which he had taken of the man and produced at the trial. And to this must be added the testimony of the chemist, which it bears out.

In these circumstances, how could reasonable men, of the ordinary class in inexperience and want of knowledge of such things, say that the plaintiff's injuries were not caused by germ diseases, but were caused by prussic and sulphuric acid and natural gas poisoning; adding the last of the three adds, to the minds of all who have lived in natural gas and oil-producing districts, an additional reason for the conclusion that reasonable men trying and determining a case according to law, without fear, favour, or affection, could not find for the plaintiff on this question: see *Jackson v. Hyde* (1869), 28 U.C.R. 294, and *Reed v. Ellis* (1916), 38 O.L.R. 123.

It may be added that, if the case had happened to have been one within the Workmen's Compensation Act, the plaintiff's claim would have failed upon this ground, on the report of the Board's medical referee, as well as the investigation made by one of its members.

I am accordingly in favour of allowing this appeal and dismissing this action, for each of these three reasons.

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Appeal allowed.

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[APPELLATE DIVISION.]

May 30.

OSBORNE V. CLARK.

Husband and Wife—Action by Husband against Wife's Parents—Alienation of Wife's Affections—Loss of Consortium—Rights of Husband and of Parents—Enticing and Harboursing—Verdict of Jury in Favour of Plaintiff—Lack of Evidence to Support—Dismissal of Action.

The plaintiff sued his wife's parents for damages for alleged "misconduct and actions" whereby his wife's affections had been alienated from him and he had suffered loss of *consortium*, and for that his wife had been enticed away, received, and harboured by the defendants. At the trial, the jury found a verdict for the plaintiff with \$800 damages, for which amount and costs the trial Judge directed judgment to be entered:—

Held, upon appeal, that there was no evidence upon which the verdict could properly be based; and the action was dismissed.

Discussion of the law and authorities upon alienation of affections, loss of *consortium*, the respective rights of a husband and of parents, abduction or enticing away, and harboursing.

Winsmore v. Greenbank (1745), Willes 577, *The Queen v. Jackson*, [1891] 1 Q.B. 671, and *Bannister v. Thompson* (1913-14), 29 O.L.R. 562, 32 O.L.R. 34, specially referred to.

AN appeal by the defendants from the judgment of CLUTE, J., at the trial, upon the findings of the jury, in favour of the plaintiff, in an action against his wife's father and mother to recover damages for alleged "misconduct and actions" of the defendants whereby his wife's affections had been alienated from him and he had suffered loss of *consortium*, and for that his wife had been "enticed away, received, and harboured by the defendants."

The jury found a verdict for the plaintiff and assessed his damages at \$800, for which amount and the plaintiff's costs of the action the trial Judge directed judgment to be entered.

May 14. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

W. S. MacBrayne, for the appellants, argued that there was no legal cause of action disclosed by the evidence. In the circumstances, the parents were justified in refusing access to the son-in-law. There was no alienation of the wife's affections; nor was there any harbouring of the wife against the will of the husband. nor any abduction or enticing away.

The plaintiff, respondent, was not represented.

May 30. MEREDITH, C.J.C.P.:—This action is brought by the plaintiff against his wife's father and mother for damages for

interference with his rights as husband of their daughter. At the trial the jury found a verdict in his favour and assessed his damages at \$800, and thereupon the trial Judge directed that judgment be entered in the action accordingly, with costs of the action; and the question involved in this appeal is whether the evidence adduced at the trial is sufficient to sustain that verdict and judgment.

The material facts upon which the case depends are few; and they are not at all in doubt.

Not long after the birth of the plaintiff's first child, his wife became ill, physically and mentally, and, in consequence of that illness, it was deemed by all concerned advisable that she and her husband should leave their own house and live with the defendants for a while, as the wife was not in a fit state of health to be left alone, as she had to be, during her husband's work-hours, when living in their own home; and that arrangement was carried out; but, very soon afterwards, the disagreements out of which this action has arisen began. The mother-in-law objected to the plaintiff going into his wife's room when she, acting as she asserted on the advice of the physician attending the sick woman, considered it harmful. According to the plaintiff's evidence, on two different days he was thus prevented; and on the second occasion he left the house and did not come back again; his wife remained for about six months, and then, meeting her husband in the street, a reconciliation took place and they at once began to live together again.

I am unable to agree with the trial Judge in his ruling that a cause of action arose out of these circumstances, or out of any other circumstances proved at the trial.

The plaintiff and his wife were living with the defendants merely by leave of the defendants—a leave which might be revoked at any time. There was no contract between them giving the plaintiff a legal right of entry to the room in which his wife was, and from which he was once, according to the female defendant's testimony, twice, according to his, excluded. He can recover, if at all, only because of some infringement upon his marital rights.

In that respect the action is based upon the two common causes: abduction and harbouring of the wife.

Alienation of her affections was also to some extent relied upon at the trial; but there was no evidence of that: all that was done,

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whether wisely or unwisely, seems to have been done for the purpose of restoring the young wife to good health again.

Abduction, or enticing away, as it is now more commonly called, seems also to be out of the question: the wife went to live with the defendants not only with the husband's consent but with him: the common welfare of all concerned required that she should.

And the plaintiff quite failed to take the usual steps to give a right of action against a defendant for harbouring a plaintiff's wife. He made no assertion of his right to take her away; and made no request to the defendants to deliver her up to him.

The law applicable to abduction is thus comprehensively stated in a few words by Sir William Blackstone in his Commentaries on the Laws of England: the husband is "entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause."

As to harbouring, in the early case of *Winsmore v. Greenbank* (1745), Willes 577, the ruling was: that any person who receives a married woman into his house and suffers her to continue there, after he has received notice from her husband not to harbour her, is liable to an action, unless the husband has by his cruelty or misconduct forfeited his marital rights, or turned his wife out of doors, or by some insult or ill-treatment compelled her to leave him. And in the case of *Philp v. Squire* (1791), 1 Peake 114 (*82), Lord Kenyon is reported to have ruled: that, even though notice had been given in that case by the husband to the defendant, no action lay because the defendant seemed to have acted solely from principles of humanity.

Indeed the law seems never to have had any difficulty in finding a navigable channel between improper interference between husband and wife, by third persons, on the one side, and undue domineering, or petulant fault-finding of the husband, on the other: see *The Queen v. Jackson*, [1891] 1 Q.B. 671; and *Barnes v. Allen* (1864), 1 Abb. App. Dec. (N.Y.) 111.

I am in favour of allowing the appeal and dismissing the action.

MIDDLETON, J.:—The action is brought by a young machinist against his father-in-law and his mother-in-law to recover \$10,000 damages for alleged "misconduct and actions" of the defendants

by which his wife's affections have been alienated from him and he has suffered loss of *consortium*, and "for that his said wife has been enticed away, received, and harboured by the defendants."

The action was tried before Mr. Justice Clute and a jury on the 31st March, 1919, when a verdict for the plaintiff was found for \$800, and judgment was entered for that amount and costs. From this judgment the defendants now appeal.

In the statement of claim, and in the evidence at the trial, there is much that is only relevant as going to shew malice on the part of the defendants, though malice is not expressly charged.

In this statement of claim it is alleged that the marriage with the defendants' daughter took place on the 1st June, 1916, and that the plaintiff and his wife resided happily together until some time in August, 1917. It is then said that a few days after the marriage the plaintiff and his wife went to the defendants' house to obtain some property, when the mother-in-law detained the wife and assaulted the plaintiff. A police officer was then called in, and apparently the episode ended.

The plaintiff rented from the father-in-law a dwelling house, where he and his wife lived, but when he went to pay the rent he was "always treated with coldness and aversion."

In August, 1917, it is said, the father-in-law stayed at the plaintiff's residence for three days, and during that time had private conversations with the plaintiff's wife, after which she "seemed upset and disturbed in mind to such an extent that the plaintiff thought it wise to take her to her parents' residence, which he did, remaining there over night with her.

"It was then arranged between the plaintiff and the defendants that the plaintiff and his wife should take rooms with the defendants. The plaintiff returned to his house to make the necessary preparations, and on attending again at the defendants' house he was refused admission, ordered off the premises, and threatened with arrest by the defendant Rachel Clark.

"Since that time he has seen his wife on only one occasion, when he was walking past the residence of the defendants and saw his wife in the yard. He was talking to her over the fence when the defendant Rachel Clark came out of the house, and, seizing the plaintiff's wife, forcibly took her into the house, thus parting her from the plaintiff."

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All this leads up to the claim for \$10,000 for alienation and harbouring.

By the statement of defence, after denying all misconduct, the defendants said that the plaintiff, at the request of his wife, and on the advice of her physician, brought her and her child to their home, where she and her child had since been cared for. The child was born in August, 1917, and following the birth of the child the plaintiff neglected to provide suitable food, nursing, and medical attendance for his wife, and treated her with such cruelty that her health was impaired: that she had been suffering from nervous trouble since coming to live with the defendants, and on the advice of her physician her husband had not been permitted to see her, as such interviews seriously retarded the improvement of her health. The defendants further said that they had done nothing whatever to influence their daughter in her relations with her husband, and all that they did was necessary for the recovery of her health, and what they did was done with the consent and approval of the plaintiff, and since his wife came to reside with them he had done nothing whatever towards the support of his wife and child.

The writ in this action was issued on the 25th September, 1917, the statement of claim filed on the 13th October following; and the defence was filed in due course on the 23rd October.

The action was tried on the 27th March, 1918, and the jury disagreed. The trial was then twice postponed, and finally took place on the 31st March, 1919, with the result above stated.

From the evidence given at the trial it appears that the plaintiff was not regarded by the defendants as a desirable suitor for their daughter. His attentions were discouraged. To use his own words, "They used me cool." The result was an elopment and marriage, the daughter at this time being only 18 years old. When, three days after the marriage, the young husband went to his father-in-law's house, as he says, "for her things," his mother-in-law met him, and his reception was not entirely pleasant, for "she hauled off and struck me in the face." He then secured the assistance of a policeman and went again: "She hauled off and hit me in the face and told me to get off the premises or she would have me arrested." Yet the "things" were given up to him. Almost immediately afterwards it is found that he is a

tenant of a house owned by his father-in-law, paying a rental, the wife each month going to her father with the money.

Things went on in this way 8 or 9 months until a child was born on the 28th April, 1917. Then the parents first visited their daughter. The husband had to go to his work and apparently was not much in the house. His mother-in-law again "used me kind of cool." A woman was procured to assist at the birth and was two weeks with the wife. She was then left alone to care for herself and her child and the house, and this went on for a couple of months, it is said (I think, in truth, until August), when the father came down and stayed for two or three days. It is clear that at that time the wife was in an exceedingly serious physical condition, and it was suggested—it is not clear by whom—that she should give up housekeeping and go to live with her parents. It was probably contemplated that the husband should also stay with them.

The husband's description of the wife's condition is that she was "acting strange." It is clear that she had broken down both physically and mentally.

If one departs from the story as told by the plaintiff and sees what the girl's mother has to say, the situation becomes very plain. The daughter did not know what she was doing or what she was saying: she did not know where she was. She was sitting in the house shivering and shaking. The plaintiff was naturally much alarmed. No doctor had been brought in, but one was sent for. He did not like to interfere, and thought the doctor who attended upon the birth should be called in. The mother-in-law said some arrangements would have to be made: the daughter could not stay where she was. She had been speaking of coming home, and the plaintiff said: "That is the best thing; just take her home." This was done, and another doctor was then called in, who advised that she must be kept absolutely quiet, and that her husband must not be allowed to see her, because his presence seemed to excite her. She was so weak when taken home that she had to be practically carried into the house. All this is not really disputed by the husband. He stayed with the defendants for three days, and was then told that he should go and make his home with his brother, who had a house, and that he would not be further admitted to their house. He went away, apparently

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acquiescing, and stayed with his brother, but the next day came back and was ordered off the premises. From this time on he never even called to make any inquiries as to his wife's condition. He says in the evidence that he walked past the house but did not see her.

The day after the husband was excluded, probably about the 1st September, the wife's father came to ask for her clothes and other property, but the plaintiff refused to give them up, and then apparently both the husband and the father went to an over-officious Police Magistrate to lay the situation before him. The result of the deliberation was that this Solon concluded that the wife was probably insane, and communicated with the Asylum doctors and had them call at the defendants' residence to see whether this unfortunate young woman should be removed to the Asylum, this apparently being what her husband desired. On the 3rd September, the husband caused to be published in the newspapers an advertisement that he would no longer be responsible for his wife's debts, and this was followed by a counter-move on the part of the father-in-law, who had a summons issued under the Married Women's Property Act for the purpose of determining the ownership of certain chattels, including a piano, given by him to his daughter before marriage. Upon the hearing of this summons before the County Court Judge, the property was adjudged to be the wife's and directed to be given up.

In the course of time the wife improved to some extent, and then the episode occurred of which much is made, when the husband, seeing his wife in the garden, talked to her and sought to induce her to go away with him. He says that her mother then pulled her into the house.

The mother's version is that she did not interfere until she saw that her daughter was in a condition of collapse, then she assisted her into the house. This occurred in November.

In the following February, the plaintiff met his wife upon the street. She was then restored to health. He asked her to go home and she returned with him and has ever since lived with him. A second child was born in the following November.

In his evidence at the trial the plaintiff admits that there has been no alienation of his wife's affections.

The wife was called as a witness by her parents, but declined to give evidence, stating that she had nothing to do, and would

have nothing to do, with this litigation. When the wife rejoined her husband, she took away all her property that had been in her father's house. As to the terms upon which the plaintiff and his wife were to occupy rooms at the defendants' house the evidence is exceedingly unsatisfactory. There is no statement sufficient to indicate any leasing. No mention is made of what was to be paid or the premises to be occupied; and, although in the charge to the jury reference is made to a supposed wrongful exclusion of the plaintiff from rooms that he had rented, that is not the cause of action which is set up in the statement of claim.

No medical evidence was given at the trial. One of the doctors was dead.

I have read the evidence more than once and with care, and am satisfied that, upon the indisputable facts, no cause of action has been shewn.

The right of a husband to the comfort and assistance of his wife, to all that is called for convenience her *consortium*, cannot be denied, and any outsider who interferes and deprives the husband of this, does so at his peril. When the wrongdoer is a man seeking the affection of the wife and enticing her from her rightful allegiance, the heinous nature of the wrong is obvious and needs no comment. When the persons accused are the parents of the wife, the situation is widely different. Though the relationship of parent and child still continues, it has become subordinate. Parents have still a right to guide, counsel and protect, but the husband is the true guardian of his wife, and under all normal circumstances the parents have no right to interfere between the husband and his wife; but, when what is done is done honestly and reasonably for the daughter's welfare, particularly where it is done with the husband's assent, no action will lie. I do not mean by this that the wife's parents may entice her away from her husband, even if they think that this is in the wife's interest. The duty which the wife owes to her husband is higher than a mere contractual obligation. One who induces another to break a contract is liable in damages, unless there is justification for his course. One who without justification induces the wife to violate her obligation towards her husband is, on the like ground, liable in damages.

In *Bannister v. Thompson* (1913), 29 O.L.R. 562, 15 D.L.R. 733, I had occasion to investigate with care the foundation of an

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action for damages for enticing a wife when there was no seduction. It was there found that the defendant had enticed the plaintiff's wife and procured her to absent herself unlawfully without the plaintiff's consent from his house, and secondly that the defendant had alienated from the plaintiff the affections of his wife and deprived him of her services and society. These two claims were presented as separate counts, and the jury assessed the damages upon them separately, and I awarded the total amount so found, doing so with some hesitation, feeling that it might well be that these two counts were in reality an alternative description of the same wrong. Upon appeal, the Divisional Court (1914), 32 O.L.R. 34, 20 D.L.R. 572, took the view that these paragraphs covered essentially the same ground, and affirmed the judgment with a variation as to the amount to be recovered.

Winsmore v. Greenbank, Willes 577, is accepted as the foundation of the English law upon the subject, and undoubtedly conclusively establishes liability where the defendant "unlawfully and unjustly persuaded, procured, and enticed the wife" to leave her husband. That case is sometimes cited as though it were an authority which would support the proposition that a person who receives or harbours a wife, while she is living apart without her husband's consent, commits an actionable wrong. That proposition is in no way mooted in the case. Liability is said to be based upon an unlawful act on the part of the defendant. "If the fact that is laid by which he lost it" (i.e., his wife's *consortium*) "be a lawful act, no action can be maintained. By *injuria* is meant a tortious act: it need not be wilful and malicious; for though it be accidental, if it be tortious, an action will lie" (p. 581). "Had the words 'unlawfully and unjustly' been omitted" (i.e., from the declaration), "this question might have been material, because it is lawful in some instances for the wife to leave the husband" (p. 584).

The law applicable here is, as I have already said, in my view strictly analogous to the law as to procuring a breach of contract. I quote from Lord Macnaghten in *Quinn v. Leathem*, [1901]A.C. 495, 510, who says that the decision in *Lumley v. Gye* (1853), 2 E. & B. 216, "was right, not on the ground of malicious intention . . . but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of

legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference;" and from Lord Lindley, in the same case, p. 535: "The principle involved . . . cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him."

From what is said in this case, it is plain that malice, in the sense of personal ill-will or evil motive, is not the foundation of the action, and in *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K.B. 732, it is said by the Master of the Rolls that the converse of this is true, and no amount of good intention can justify the use of illegal means.

In *Glamorgan Coal Co. v. South Wales Miners' Federation*, [1903] 2 K.B. 545, *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239, there is a discussion of the circumstances under which a third party is justified in going so far as to advise another to break a contract without incurring liability. That circumstances can amount to a justification is practically conceded, but no limitation of the right is laid down. What is said by Stirling, L.J., in the Court of Appeal, [1903] 2 K.B. at p. 577, is important: "That interference with contractual relations known to the law may in some cases be justified is not, in my opinion, open to doubt. For example, I think that a father who discovered that a child of his had entered into an engagement to marry a person of immoral character would not only be justified in interfering to prevent that contract from being carried into effect, but would greatly fail in his duty to his child if he did not."

The relationship between parent and child constitutes a lawful justification and excuse for advice and counsel honestly given by a parent looking to the child's welfare, but in each case there must be the most careful scrutiny to see that this limit of lawfulness is not transcended, and greater care is necessary, where, as here, the parent has disapproved of the marriage, and is, rightly or wrongly, antagonistic to the spouse.

In this case there is absolutely no evidence by which any finding of malice on the part of the parents could be made. The course of action which, it may be said, they advised and counselled,

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was one which commended itself to the daughter and to the son-in-law. Manifestly the taking of the daughter to her old home and placing her under the care of her mother relieved her from a great deal of domestic anxiety and was the best thing to be done to restore her to mental and physical health. Up to this point there could have been no wrongdoing, and there is no suggestion that from this time on there was any enticement of the daughter to abandon her husband. The cause of action, if any, must be based upon the contention that the refusal to allow the husband to see his wife constituted a harbouring of the wife for which the defendants are liable.

In the old books of pleading, e.g., Bullen and Leake, 2nd ed. (1863), p. 295, two counts are given, the first, based upon *Winsmore v. Greenbank*, for wrongfully enticing and procuring the wife to depart and remain absent, the second for harbouring. This count does not purport to be based on any decided case, but reads that "G.B. was and is the wife of the plaintiff, and unlawfully and without the consent and against the will of the plaintiff departed from the house and society of the plaintiff; and the defendant, well knowing the premises, wrongfully and without the consent and against the will of the plaintiff received, harboured, and detained the said G., and refused to deliver her to the plaintiff, although requested by the plaintiff so to do; whereby," &c. Nothing that took place here could be so tortured as to be brought within this count.

But I am of opinion that under the law, as it now is, the suggested cause of action will not lie—at any rate unless it is shewn that the wife was detained against her own will.

In the case of *The Queen v. Jackson*, [1891] 1 Q.B. 671, it was determined that where a wife refuses to live with her husband, he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights. It was there determined that the wife is her own mistress, and, notwithstanding marriage, can set up her will as to her own custody against her husband's will; that he is not entitled to assert his rights over her person without her consent, and, if she chooses to live apart from him, even without cause, he cannot forcibly take possession of her body. From this it follows that where the wife chooses to live apart from her husband he cannot maintain an action against the person with whom she lives for wrongfully detaining her from him.

Here the husband voluntarily surrendered his wife, she fully concurring, to her parents. He never requested her return; but, upon being refused access to the parents' house, left the wife, without further complaint, in their custody. This is in no sense a harbouring, even within the meaning of the old law. The word "harbouring" as used in the cases is used in the dyslogistic sense, as meaning "to conceal or . . . give secret or clandestine entertainment to noxious persons or offenders against the laws." See Murray's English Dict., vol. 5, p. 83, "Harbour."

When the law recognises that a wife who chooses to live apart from her husband may do so, she cannot be regarded as a noxious person or offender against the law whom it is unlawful to succour.

The whole question of the right of a parent to interfere has been the subject of more discussion in American than in English cases. See, for example, *Multer v. Knibbs* (1907), 193 Mass. 556, copiously annotated in 9 L.R.A.N.S. 322; *Tucker v. Tucker* (1896), 32 L.R.A. 623; *Beisel v. Gerlach* (1908), 18 L.R.A.N.S. 516.

For these reasons, it appears to me that this appeal must be allowed and the action dismissed with costs.

BRITTON, J., agreed with MIDDLETON, J.

RIDDELL, J., agreed in the result.

Appeal allowed.

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[APPELLATE DIVISION.]

May 30.

RE NEW YORK LIFE INSURANCE CO. AND FULLERTON.

Insurance (Life)—Policy-moneys Claimed by Beneficiary Designated by Assured and also by Execution Creditors of Assured—Insurance Act, R.S.O. 1914, ch. 183, sec. 171 (1), (2)—Limited Relief under sub-sec. 2 where Premiums Paid with Intent to Defraud Creditors—Right of Defrauded Creditors to Reach Moneys—Right of Beneficiary Saved by Statute, Subject to Limited Relief if Fraud Established.

The judgment of ROSE, J., *ante* 244, was affirmed by a Divisional Court.

Held, per MEREDITH, C.J.C.P., that, assuming that the policy was obtained, and kept in force, for the purpose of evading the claims of creditors, the effect of sec. 171 of the Insurance Act, R.S.O. 1914, ch. 183, was to prevent the creditors from reaching the insurance moneys except to the limited extent indicated by sub-sec. 2. The effect of sub-sec. 2, giving expressly the limited relief, is that impliedly greater relief is withheld. But for the statute the moneys could be reached by defrauded creditors; and, if the execution creditors, the appellants, sought the limited relief afforded by sub-sec. 2, they should have an opportunity of proving their allegations of fraud.

Holt v. Everall (1876), 2 Ch.D. 266, treated as inapplicable by reason of the English statute differing from the Ontario enactment.

Per MIDDLETON, J. (BRITTON and RIDDELL, JJ., concurring), that an assignment or settlement of insurance moneys may be attacked as being a fraud upon creditors; but the effect of sec. 171 is to give to the beneficiary the right to the insurance moneys, subject to the provision for payment to the creditors of the amount of any premium fraudulently paid.

Holt v. Everall, supra, applied.

AN appeal by W. L. McKinnon & Co. from the order of ROSE, J., in Chambers, *ante* 244.

May 14. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

J. B. Clarke, K.C., for the appellants, argued that their claim came within the provisions of R.S.O. 1914, ch. 105, the Fraudulent Conveyances Act. Section 2 (b) of that Act states what "personal property" includes, but does not say that the term must be confined to the things enumerated there. The money secured by the policy was personal property, and so was exigible. The designation of the beneficiary was fraudulent and void as against creditors under sec. 3 of that Act: *Stokoe v. Cowan* (1861), 29 Beav. 637; *Taylor v. Coenen* (1876), 1 Ch. D. 636. [RIDDELL, J., referred to May on Fraudulent and Voluntary Conveyances, 3rd ed., p. 15.] The statute covers appointments, and this designation was an appointment: *Halsbury's Laws of England*, vol. 15, p. 79; *Whittington v. Jennings* (1834), 6 Sim. 493.

The learned Judge in Chambers should have found on the evidence that, at the time of the designation, the assured was insolvent.

J. E. Lawson, for Elizabeth Fullerton, the respondent, relied on the reasons of the learned Judge in Chambers.

Clarke, in reply.

May 30. MEREDITH, C.J.C.P.:—The one question which need now be considered in this case is: whether, and if at all to what extent, the insurance moneys in question can be reached by creditors of the assured, who is now dead, assuming that the policy was obtained, and kept in force, for the purpose of evading their claims: and that question presents some difficulties.

Unless a statutory provision, relied upon by the respondent, prevent, I am unable to perceive why the money should not be reached by defrauded creditors. Why not? As against such creditors the money in question is the money of the debtor's estate: the fraud avoids, as against them, the interest that the respondent acquired in the money: except as against them the money is hers.

But sec. 171 of the Insurance Act, R.S.O. 1914, ch. 183, is a formidable obstacle in the appellants' way. If it apply to this case, the creditors' rights extend only to the amount of the premiums paid by the insured with intent to defraud his creditors. That part of the section directly affecting the question is in these words:—

"171.—(1) Every person of the full age of twenty-one years shall have an unlimited insurable interest in his own life and may effect *bonâ fide* at his own charge insurance of his own person for the whole term of life, or any shorter term for the sole or partial benefit of himself, or of his estate, or of any other person, whether the beneficiary has or has not an insurable interest in the life of the assured, and the insurance money may be made payable to any person for his own use or as trustee for another person.

"(2) If the premiums on such insurance were paid by the assured with intent to defraud his creditors they shall be entitled to receive out of the insurance money an amount not exceeding the premiums so paid and interest thereon."

Sub-section 2 was apparently first introduced to the statute-law of this Province in 1884, as sec. 21 of an Act to Secure to

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Wives and Children the Benefit of Life Insurance, and was confined to insurance of that character; and it so remained, apparently, until the year 1897, when it was carried into the Ontario Insurance Act, which dealt with the subject of insurance generally in the Province, and was something in the nature of a codification of the provincial laws on the subject; and there it lost its expressed restrictive application, being, substantially, there introduced in its present form in so far as this question is affected by it.

The language of sub-sec. 2, standing alone, would be anything but a clear and explicit answer to the creditors' claims: and it would be much less so after the Act of 1897 than before: when embodied in an Act making provision for wife or widow and children only, it might have an irresistible power to shield them; whilst, if used to protect those who had neither legal nor moral claim on the insured, it might be a shield easily pierced. The difficulty now is to make it apply to any one without making it applicable to every one. And the difficulty seems to have arisen from the draftsman or codifier of the law being under the impression that without such a provision the creditors could take nothing: at all events that is the only explanation of the legislation which at the moment occurs to me. He must have failed to observe the general words of protection against creditors in sec. 178 (2), else he should either have made the sub-section in question a sub-section of sec. 178, and so restricted its effect to wife and children and others of the preferred class, or else have added to sub-sec. 2 of sec. 171 the protective words contained in sec. 178 (2).

However, it is manifest that some effect was intended to be given to sub-sec. 2, and the only effect which, as it seems to me, can be reasonably given to it is: that expressly the limited relief is given to creditors and impliedly greater relief is withheld; and that no interpretation can apply it logically to any class or person without applying it to all.

I therefore reach the conclusion that the appellants, if they should prove the fraud, could have the limited relief but that only; and, as I understood counsel, that is not sought; but, if it be, the parties should go to a trial of an issue about it.

The case of *Holt v. Everall* (1876), 2 Ch. D. 266, has not afforded me much assistance, the statute there in question being so plainly worded that the only question which arose, or could have arisen,

in that case was: whether it was one within the provisions of the Act. It is much to be regretted that the Act in question in this appeal was not expressed as the Act in question in that case is— if that which is there expressed were really meant by the Legislature here.

That enactment (the Married Women's Property Act, 1870, sec. 10) is in these words:—

“A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or his creditors or form part of his estate.

“If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.”

This legislation is therefore precisely as the legislation here in question would be if sub-sec. 2 of sec. 171 were sub-sec. 3 of sec. 178, instead of as it is, and then, as I have said, the law here would be as it is in England—except that the preferred class here includes wife and children only.

No words like the words “shall not . . . be subject to the control of the husband or his creditors or form part of his estate” are contained in the enactment in question in this case, though they are contained in sec. 178 (2), as I have said; and it is not, as the other is, for the benefit only of wife or widow and child or children. To make this case like the case of *Holt v. Everall*, sub-sec. 2 of sec. 171 must be taken away from its present place and made part of sub-sec. 2 of sec. 178. It is, however, to be borne in mind that the Act in question does not permit of abstractions from the debtor's property for the benefit of others than creditors, but makes them good to the creditors, and gives to the third person the benefit of the lottery only, if such it may be called.

I would therefore dismiss this appeal, but only on the ground that the statute prevents the relief sought being given, relief

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which, but for it, the appellants should have if they proved their allegations of fraud: but subject to this: that they should be at liberty to seek the limited relief in the way I have mentioned, though, in any case, they must pay the costs of this appeal.

MIDDLETON, J.:—The Insurance Act, R.S.O. 1914, ch. 183, sec. 171 (1), permits an insurance by any person for the benefit of another, whether the beneficiary has or has not an insurable interest in the life of the assured.

By sub-sec. 2, if the premiums paid are paid by the assured with intent to defraud his creditors, they shall be entitled to receive out of the insurance money an amount not exceeding the premiums so paid and interest thereon.

The history of this section is given in the judgment in review and need not be repeated.

In *Holt v. Everall*, 2 Ch. D. 266, the Court of Appeal dealt with the effect of the similar provision found in the Married Women's Property Act, and held that the effect of the legislation was to give to the beneficiary the right to the insurance money, subject to the provision for payment to the creditors of the amount of any premium fraudulently paid.

Bunyon, *Law of Life Assurance*, 4th ed., pp. 564, 565, recognises this as the law, saying: "It would seem, therefore, that in case a settlement is made by means of a policy effected in pursuance of this Act, even where it is proved to have been made with intent to defraud the creditors, their trustee will not be entitled to claim the policy, but merely to the amount of the premiums fraudulently paid."

If the statute had not made this provision, there is abundant authority for holding that an assignment or settlement of insurance money may be attacked as being a fraud upon creditors. The cases are collected in Bunyon, p. 525 *et seq.*

The appeal should be dismissed with costs.

BRITTON and RIDDELL, JJ., agreed with MIDDLETON, J.

Appeal dismissed with costs.

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June 2.

LEAVITT V. SPAIDAL.

Insurance (Life)—Benefit Certificate—Mortuary Benefit Payable to Estate of Assured—Designation of Beneficiaries by Document Signed by Assured and Intended as Will but not Executed as such—Reference to "Insurance"—Sufficiency as Declaration under Ontario Insurance Act, 2 Geo. V. ch. 33 (R.S.O. 1914, ch. 183), secs. 2 (19), 171 (3), (4), (5)—Subsequent Renewal of Benefit Certificate—Application in Writing Signed by Assured—Benefit Made Payable to Estate—Annulment of Previous Declaration.

L., who died in March, 1918, was then and had for many years before been a member of a benefit association, and by the terms of his membership a mortuary benefit was payable to his estate. In 1915 he signed a document in the form of a will by which he appointed S. "sole executor, to pay debts and sell ranch and collect all accounts and insurance. The proceeds to be divided between his children and the children of F. T." The document was not witnessed. L. had no other insurance. His membership in the association was renewed annually; and in January, 1918, the association received from him a renewal application in writing, signed by him, containing the words, "Benefit in case of death payable to my estate:"—

Held, that the document signed by L. (though ineffective as a will) was an instrument in writing sufficiently identifying the mortuary benefit payable by the association to constitute it a declaration designating the children referred to in it as beneficiaries: Ontario Insurance Act, 2 Geo. V. ch. 33 (R.S.O. 1914, ch. 183), secs. 2 (19), 171 (3), (4), (5).

In re Jansen (1906), 12 O.L.R. 63, distinguished.

But *held*, that the effect of the renewal application in January, 1918, was to annul the declaration made in the testamentary document and to divert the insurance money to the estate of L. (sub-sec. 3 of sec. 171).

MOTION by the plaintiff for judgment in the action, upon a special case stated, under Rule 126, to determine the question whether the plaintiff, the administrator of the estate of William H. Leavitt, deceased, or the defendants, was or were entitled to a sum of money in the hands of the Treasurer of the Province of Québec.

May 15. The motion was heard by CLUTE, J., in the Weekly Court, Toronto.

J. A. Macintosh, for the plaintiff.

J. A. Hutcheson, K.C., for the defendant D. M. Spaidal and for the Official Guardian, representing the infant defendants.

June 2. CLUTE, J.:—The intestate William H. Leavitt died on the 8th March, 1918, having at the time of his death and for some years prior thereto a fixed place of residence in the township of Faraday, in the county of Hastings, Ontario.

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The plaintiff is the administrator of the estate, and is also sole heir and beneficiary of the deceased.

The said William H. Leavitt, at the time of his death and for many years prior thereto, was an associate member of the Dominion Commercial Travellers' Association, incorporated by Dominion Act in the year 1880, and by the terms of his membership a mortuary benefit of \$1,200 was payable to his estate.

Proof of claim was duly made, and accepted as sufficient, of the death of the said William H. Leavitt, and the liability of the association to pay \$1,200 was admitted, but the association declined to pay the plaintiff by reason of a claim made by the defendant D. M. Spaidal on behalf of his children, the infant defendants.

It appears that prior to the death of the intestate he drew his own will, but he did not have it executed in accordance with the Wills Act, and it is invalid as a testamentary document: he named the defendant Spaidal as the executor of the will, the clause of which relating to this case is as follows:—

"I appoint D. M. Spaidal, Brockville, sole executor, to pay debts and sell ranch and collect all accounts and insurance. The proceeds to be divided between his children" (the defendant's) "and the children of Fred Tisdale of 216 Rusholme road, Toronto."

The will is dated the 28th September, 1915, and signed "William H. Leavitt." No witnesses. There are added some further gifts on the 29th September, 1915, the addition being also signed "William H. Leavitt," but not witnessed. The document was not communicated by the intestate in his own lifetime to the said association or to the defendants or any of them. It was entered in a day-book, which was found among the personal effects of the deceased at his residence in Faraday. It is stated in the case that, after the death of Melicia Leavitt, wife of the said William H. Leavitt, the latter said to the defendant D. M. Spaidal that it was his wife's wish that the infant defendants should share in his estate, and in such conversation mentioned his insurance, and referred to it as his "Travellers' insurance."

It was admitted in argument that he had no other insurance. The wife of the intestate predeceased him, on the 14th September, 1914.

The membership of the said William H. Leavitt in the said association was renewed annually in the month of January in each

year, by the said William H. Leavitt signing, upon a form of the said association, an application for renewal, and forwarding the same to the association, accompanied by the renewal premium of \$10 for the current year; and on or about the 2nd January, 1918, the said association received from the said Leavitt a renewal application in writing signed by him (a true copy of which forms part of the case), by which he requested the association to pay the mortuary benefit, payable by reason of his membership, to his estate. The words are, "Benefit in case of death payable to my estate."

Owing to the claim made by the defendants, the association paid the \$1,200 into the office of the Provincial Treasurer of the Province of Quebec, where it remains awaiting the determination of the respective claims of the plaintiff and the defendants. The said money is subject to a tax or charge of \$24.

The question submitted is, whether the plaintiff as against the defendants is entitled to receive the said mortuary benefit so paid to the Provincial Treasurer of Quebec, and it is agreed that, upon the determination of the said question, the Court shall give judgment declaring which of the parties to this action is entitled to receive the same, the Court to dispose of the question of costs.

The plaintiff relies on *In re Jansen* (1906), 12 O.L.R. 63, where it was held that a will invalidly executed is not an "instrument in writing" effectual to vary the benefit of an insurance certificate. Falconbridge, C.J.K.B., said: "The deceased did not intend to execute an instrument in writing to transfer the benefits of the policy *inter vivos*. His intention was to make a will, and he failed to make a valid one. I am therefore of opinion that the paper in question is not an instrument in writing which is effectual to vary the benefit of the certificate."

The *Jansen* case was decided under the Insurance Act, R.S.O. 1897, ch. 203, sec. 160, sub-sec. 1, which makes provision whereby the assured may vary the benefit or beneficiary; and the question is, whether the amendment made by the Ontario Insurance Act, 2 Geo. V. ch. 33, sec. 171, and sec. 2 (19), renders that decision no longer applicable to cases like the present under the amended law. See *Re Monkman and Canadian Order of Chosen Friends* (1918), 42 O.L.R. 363, at p. 366, and *Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, 28 D.L.R. 424.

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Section 160, under which the *Jansen* case was decided, provides that the assured may, by an instrument in writing attached to or endorsed on or identifying the policy by its number or otherwise, vary a policy or declaration or an apportionment previously made, so as to restrict or extend, transfer or limit, the benefits of the policy to the wife alone, children alone, or one or more of them, or to the mother, etc., etc., and may, from time to time, by instrument in writing attached to or endorsed on the policy, or referring to the same, alter the apportionment as he deems proper. He also may by his will make or alter the apportionment of the insurance money; and an apportionment made or altered by his will shall prevail over any other made before the date of the will: sub-sec. 1.

Under 2 Geo. V. ch. 33,* sec. 171, sub-sec. 3: "The assured may designate the beneficiary by the contract of insurance or by an instrument in writing attached to or endorsed on it or by an instrument in writing, including a will, otherwise in any way identifying the contract, and may by the contract or any such instrument, and whether the insurance money has or has not been already appointed or apportioned, from time to time appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, but not so as to alter or divert the benefit of any person who is a beneficiary for value, nor so as to alter or divert the benefit of a person who is of the class of preferred beneficiaries to a person not of that class or to the assured himself, or to his estate."

Sub-section 4 (new) provides that: "Where the instrument by which a declaration is made is a will such declaration as against a subsequent declaration shall be deemed to have been made at the date of the will and not at the death of the testator."

Sub-section 5 (new) provides: "Where the declaration describes the subject of it as the insurance or the policy or policies of insurance or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred

*The provisions of 2 Geo. V. ch. 33 quoted will be found, in the same words, in the Ontario Insurance Act, R.S.O. 1914, ch. 183.

class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration."

The last sub-section has reference to the case of the preferred class.

Sections 178 to 182 are applicable to preferred beneficiaries, who constitute a class, and include husband, wife, children, grandchildren, and mother of the assured.

I am of opinion that the amendment to the Act is such as to make the will signed by the intestate effective to constitute the defendants named therein beneficiaries, although the will was ineffective as such, not having been witnessed.

Section 2 (19): "'Declaration' shall include any mode of designating in writing a beneficiary or of apportioning or reappportioning insurance money among beneficiaries" (new); and sec. 171, sub-sec. 3, provides that the assured may designate the beneficiary by an instrument in writing, including a will.

The testator wrote the will by his own hand and signed it. He there described the insurance simply by the word "insurance." His membership of the Travellers' Association, it is admitted, is all the insurance he had. This simple description, there being no other insurance, is, I think, sufficient. See sec. 171, sub-sec 5.

The will is dated the 28th September, 1915, and was effective, I think, under the statute, to designate the infant defendants as the beneficiaries.

A further question, however, remains—as to the effect of the renewal application made in January, 1918, without which the certificate lapsed. There it is stated that the "benefit in case of death (is) payable to my estate." If the previous declaration made by will continued effective to death, the insurance would form no part of the estate. The question is, did the application for renewal annul the declaration previously made to the infant defendants by making the insurance "payable to my estate?"

Sub-section 3 of sec. 171 expressly provides that the assured may alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate. This is precisely what he has done, and I am unable to give effect to the argument of counsel for the defendants that, although it was again diverted to become part of his estate,

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the instrument called a will of the 28th September, 1915, is still effective to designate the beneficiaries. I think that was disposed of by the renewal, and the effect of the statement in the renewal is to make the insurance money part of his estate.

I direct judgment in favour of the plaintiff, declaring that the plaintiff, as administrator of the estate of the late William H. Leavitt, is entitled to receive the said insurance moneys, less \$24 tax, for which I do not think the defendants should be held responsible. The contest was reasonable and proper, and the payment of the insurance money to the Provincial Treasurer was proper, and it cannot be fairly said, I think, that the defendants were in any way responsible for the tax thereon imposed or for the money having been paid into the treasury. That was incident to the proceedings, and a necessary incidental expense.

Having regard to the peculiar circumstances of this case, all parties should have their costs out of the fund, the administrator as between solicitor and client.

I may also refer to the following authorities: *Kreh v. Moses* (1892), 22 O.R. 307; *In re Cochrane* (1908), 16 O.L.R. 328; *Re Rutherford* (1917), 40 O.L.R. 266; *Re Beam* (1911), 3 O.W.N. 138; *Re McGregor* (1909), 18 Man. R. 432; Lavery's Insurance Law (1911), pp. 98, 99, 100; the Insurance Act, R.S.O. 1914, ch. 183; *Re Hewitt and Hewitt* (1918), 43 O.L.R. 286, 43 D.L.R. 716.

[APPELLATE DIVISION.]

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June 13.

RE OTTAWA GAS CO. AND CITY OF OTTAWA.

Highway—Closing and Sale of Part of Highway in City—Municipal Act, R.S.O. 1914, ch. 192, secs. 325 (1), 433, 472 (1) (c)—Pipes of Gas Company Laid under Soil of Highway—Statutory Authority (29 Vict. ch. 88, sec. 2)—Removal of Pipes and Relaying in Substituted Street—Rights of Company and City Corporation in Highway—Expense of Removal of Pipes—Compensation—Right to—Award Set aside—Amount of Award.

A gas company, having power by statute (29 Vict. ch. 88, sec. 2) to lay down gas pipes in the highways of a city, and at all times, and from time to time, to open up and dig up the highways for the purpose of repairs and renewals, and laying down new plant and pipes, had laid down their pipes under the surface of a street in the city. The city corporation, in the exercise of the powers conferred by sec. 472 (1) (c) of the Municipal Act, R.S.O. 1914, ch. 192, and pursuant to a by-law passed by the council, stopped up and sold a part of the street and substituted for that part land which they had acquired for the purpose. The company thereupon took up their pipes and relaid them on the new line:—

Held, that they were not entitled to compensation from the city corporation for the cost of taking up and relaying the pipes.

Per MEREDITH, C.J.C.P.:—The gas company took no permanent right in the land—their rights in the highway ended when the highway's existence ended. There was no right to compensation under sec. 325 (1) of the Municipal Act: the company were deprived of nothing, and no injurious effect was caused to any of their property.

Metropolitan R.W. Co. v. Fowler, [1893] A.C. 416, and *Toronto Corporation v. Consumers' Gas Co.*, [1916] 2 A.C. 618, distinguished.

Per RIDDELL, J.:—The pipes, being laid by statutory authority, became *partes soli*: *Toronto Corporation v. Consumers' Gas Co.*, *supra*. There were thus two freeholds—that of the company in their pipes, with all the incidents thereto either at the common law or by statute, and that of the city corporation in the soil etc., which was limited by the rights of the company: sec. 433 of the Municipal Act. The city corporation could not by any act affect the rights of the company—whatever rights the company had before the by-law it still had. But the company had no right to compensation: for their own purposes they took up the pipes from the old position and laid them down in the new street; they did not do this upon the compulsion or request of the city corporation—the corporation simply did not interfere with the company doing it.

An award of compensation was set aside upon appeal.

Semble, *per MEREDITH, C.J.C.P.*, and *RIDDELL, J.*, that the amount awarded was excessive.

An appeal by the Corporation of the City of Ottawa from the award of an arbitrator fixing at \$1,699.11 the compensation to be paid by the appellants to the Ottawa Gas Company for the injury suffered by that company from the closing up by the city corporation and the selling and conveying of a portion of Hawthorn avenue, in the city, authorised by a by-law of the city council.

The company took up their pipes laid under the closed portion of the road, and relaid them under the soil of the land substituted by the corporation for the closed portion. The arbitrator allowed as compensation the cost of the taking up and relaying.

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May 13. The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

F. B. Proctor, for the appellants, argued that the removal by the gas company of their pipes from the portion of Hawthorn avenue stopped up by the appellants to their present location was not because of anything done by the appellants, but for the company's own purposes, and in order to secure a more satisfactory location for the gas main. The gas company were not injuriously affected by the act of the appellants, and therefore were not entitled to compensation. There had been no interference with gas pipes in this case, as there had been in *Toronto Corporation v. Consumers' Gas Co.*, [1916] 2 A.C. 618, 30 D.L.R. 590. The gas company are a corporation under the jurisdiction of the Parliament of Canada, by reason of the provisions of clause a. of para. 10 of sec. 92 of the British North America Act, and so the appellants could not exercise the powers conferred by clause (c) of sub-sec. 1 of sec. 472* of the Municipal Act, R.S.O. 1914, ch. 192, so as injuriously to affect any interest in land of the company: *Canadian Pacific R.W. Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; *Crawford v. Tilden* (1906), 13 O.L.R. 169.

G. F. Henderson, K.C., for the gas company, respondents, contended that their gas pipes were "land" within the meaning of sec. 325 of the Municipal Act, and injuriously affected by the closing of Hawthorn avenue: *Toronto Corporation v. Consumers' Gas Co.*, *supra*; *Metropolitan R.W. Co. v. Fowler*, [1893] A.C. 416. By reason of the conveyance of the closed part of the avenue, the avenue lost its character as a street, and the respondents were thereby deprived of their statutory right of access to their pipes.

Proctor, in reply.

June 13. MEREDITH, C.J.C.P.:—The main question really involved in this case is, whether there is any conflict between the power conferred by legislation upon the municipal council and the power in like manner conferred upon the gas company; upon which powers the parties' rights in this matter depend.

*472.—(1) The council of every municipality may pass by-laws, . . . (c) for stopping up any highway or part of a highway and for leasing or selling the soil and freehold of a stopped up highway or part of a highway.

Broadly stated, the power conferred upon the municipal council enabled them lawfully to stop up the highway in question and sell the "soil and freehold" of it (Municipal Act, R.S.O. 1914, ch. 192, sec. 472 (1) (c)); and that conferred upon the gas company enabled them to "lay down" in that highway their gas pipes, and "at all times, and from time to time," to open up and "dig up" the highway for the purpose of repairs and renewals, or "laying down new plant or pipes" (29 Vict. ch. 88, sec. 2).

If we confine ourselves to giving effect to the plain words which Parliament and Legislature used to express their meaning, no conflict arises.

The rights conferred upon the gas company are highway rights only: there is no power to appropriate, or, as it is generally called in these days, expropriate, land; the company get only that which in another, but less convenient, form they already had in common with the rest of the public; they already had, as other somewhat similar companies—water, electric, telephone, etc.—had also, the right to carry their goods or services, on foot or in vehicles, over the highway; but for the much greater convenience, not only of seller and buyer but of the public using the highway, they were permitted to carry their gas in pipes under the surface of the highways. There is not a word in the only enactment upon which the company relies—29 Vict. ch. 88, "An Act to change the name of 'The Bytown Consumers Gas Company,' and to confirm, amend and extend their corporate powers under the name of "The Ottawa Gas Company'"—which confers any right except in connection with a highway, and that applies not only to original construction, but to repairs, renewals, and new work: the company may open up highways only.

No reason has been suggested, nor can I imagine any, why we should extend these rights, if we had the power to do so. The needs and the interests of the company are to follow the occupied highways, to serve those residing near them. A closed street is a closed market to such a company. For this double reason—the company's highway rights and its needs and interests as to laying down pipes—doubtless, the rights conferred are expressly rights in highways only.

On the other hand, the power conferred on the municipal council is: to stop up any highway, or part of a highway, and

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lease or sell the soil and freehold of it, and that is quite consistent with the power conferred upon the gas company—consistent in words and consistent having regard to all needs, interests, and purposes. When a new highway is opened, under the power conferred on municipal councils to establish and lay out highways, or otherwise, the company's power extends to them, as their needs and interests also do; and when a municipal council under its powers closes a highway the company's powers there end, as do their needs and interests generally in regard to it also.

It must not be imagined that the closing of a highway having gas pipes in it is an everyday occurrence: on the contrary, it seems to have been unheard of before, at all events no one has been able to discover any other instance than this instance, and that it must be seldom if ever is obvious. Gas "mains" are laid in the occupied highway, and the highway is seldom, if ever, closed.

This does seem to me to be all very plain if we confine our attention to that which is best entitled to it, the words of the enactments governing the matter; that difficulty can arise only if we entangle them with the words of Judges expressed in cases which may have some kind of resemblance, but nothing more, to this case. For instance, the case in the House of Lords concerning an underground railway in London, England, *Metropolitan R.W. Co. v. Fowler*, [1893] A.C. 416, a case which is manifestly different from this case; and, for another instance, a case before the Judicial Committee of the Privy Council, *Toronto Corporation v. Consumers' Gas Co.*, [1916] 2 A.C. 618, a case concerning gas pipes, but gas pipes under an existing highway, and, therefore, plainly one in which the gas company were entitled to compensation whatsoever may have been the particular character of the company's rights in or under that existing highway so long as it came—as it manifestly did—within the wide meaning expressly given to the word "land" in the Municipal Act.

Whether the gas pipes are or are not part of the soil is not the question: the flowers that bloom in the fields are *pars soli*, as are the trees of the forest, which may be severed from it as effectually with a stroke of a pen as with strokes of an axe. The logical and determining question is: for how long? And in this case that which seems to me to be the obvious answer is: as long as the highway lasts.

In the case in the House of Lords, the underground railway case, the learned Judges who spoke of permanency were not without their difficulties, even in so strong a case as that: other Judges said nothing on the subject. But what we have to determine in this case is not even remotely touched upon in that case; therefore, there could be no excuse for us if we gave effect to some of the words expressed in that case instead of the words of the enactments governing this case. Neither in nature nor in legal estates, does the expression "part of the soil" imply permanency any more than it means a lesser time.

At no time have I been able to perceive how the legislation in question could be deemed to confer a permanent right in the land: everything seems to me to be opposed to any such notion, and I have yet heard nothing that seems to me substantially to favour it. Let us treat it in this way: if, after the closing and sale of the highway, the gas company should bring an action for right of entry upon the land to dig up or lay down pipes in it, they could rely only on the statute which gives them power to dig up and lay down pipes in highways only; and in the face of this expressed power none other could be implied.

And difficulties and conflicts multiply once the plain words of the enactments are departed from. If the gas company took a permanent right in the land, the municipal council could not sell the soil and freehold, though the enactment conferring power upon them provides that they may; and the sale in question in this matter would be invalid because the section of the Municipal Act (sec. 473 (1)) next following that conferring power to stop up and sell the highway provides that: that shall not be done so as to deprive any person of the means of ingress and egress to and from his land "over such highway," except on terms which have not been and could not be complied with.

To hold that the gas company retain their rights in the soil, after sale of the highway, seems to me to make it necessary to hold also that the gas company are entitled to compensation in this case in three respects at least: deprivation (1) of ingress and egress "over a highway;" (2) of the right "at all times and from time to time to open up and dig up" the highway for the purposes before mentioned; and (3) serving customers along the line of the highway which is closed.

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The provisions of the compensation section of the Municipal Act* are very wide, and they are remedial legislation.

But, if I am right, there is no right to compensation, the gas company are deprived of nothing, and no injurious effect is caused to any of their property. Their rights in the highway end when the highway's existence ends. The two enactments speak and work together in harmony.

And in this it is satisfactory to find myself quite in harmony with each of the parties to this appeal in all their actions until this litigation began. It is often said: Tell me what the parties did in pursuance of them, and I can tell you what their rights are.

The gas company in the first place desired to avoid laying their pipes around the jog in Seventh street, and endeavoured to buy a right of way straight through; the owner of the land, considering it valuable for building purposes, demanded a price accordingly—as it could not be built upon if subject to be opened up for repair etc. of pipes. The gas company considered it better for them to go around than pay the price demanded, and they acted accordingly.

The municipal council, a long while afterward, decided that it would be better to take Seventh street straight through, and eventually agreed with the land-owner to give the old highway for the new one; and that was done, the necessary by-law being passed and the deeds executed. The gas company then, evidently taking the same view of their powers as I have, moved their pipes from the old to the new street. Their claim subsequently made is for the cost of the removal.

That which was conveyed and which was intended to be conveyed to the land-owner was the whole of the soil and freehold of the old street; and what it was acquired for was building purposes.

*R.S.O. 1914, ch. 192, sec. 325 (1): "Where land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act or under the authority of any general or special Act, unless it is otherwise provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work, for the purpose of, or in connection with which the land is injuriously affected."

It may be that if these corporations and persons most concerned did not know what they were doing, they must take the consequences, consequences which will render the land useless to the land-owner, and which would not have been accepted willingly under any circumstances; but we should be quite sure that we are right before upsetting everything to the dissatisfaction of every one.

I may add that, if I thought the respondents entitled to compensation, I should also consider that some reduction of the amount awarded should be made: for (1) saving of large iron pipes owing to shorter line; (2) saving in "upkeep" of the shorter line; and (3) saving in pressure under the better conditions.

I am in favour of allowing the appeal and of setting aside the award, and of awarding costs throughout to the appellants to be paid by the respondents.

RIDDELL, J.:—Under the provisions of the Act of the Province of Canada (1853) 16 Vict. ch. 173, "An Act to provide for the formation of Incorporated Joint Stock Companies for Supplying Cities, Towns and Villages with Gas and Water," certain persons formed themselves into a joint stock company, "The Bytown Consumers Gas Company," for the purpose of supplying the Town of Bytown with gas. The Town of Bytown passed a by-law granting to the company the right to lay mains etc. on the streets etc. of the town. In course of time the Town of Bytown became the City of Ottawa, and the company applied for a change of name and a more formal incorporation—this was granted in 1865 by the Act 29 Vict. ch. 88; and admittedly the rights of the company depend upon the provisions of sec. 2 of that Act:—

"2. From and after the passing of this Act, 'The Bytown Consumers Gas Company' shall be called and known as 'The Ottawa Gas Company,' and shall have power to extend their operations to that portion of the Township of Gloucester, adjoining the City of Ottawa, called the Village of New Edinburgh, and also that portion of the Township of Hull, opposite the City of Ottawa, called the Village of Hull, and also to all portions of the country surrounding the city which may hereafter be taken into the limits thereof, for the purpose of supplying each of the said villages, and other parts aforesaid, with gas light, and for

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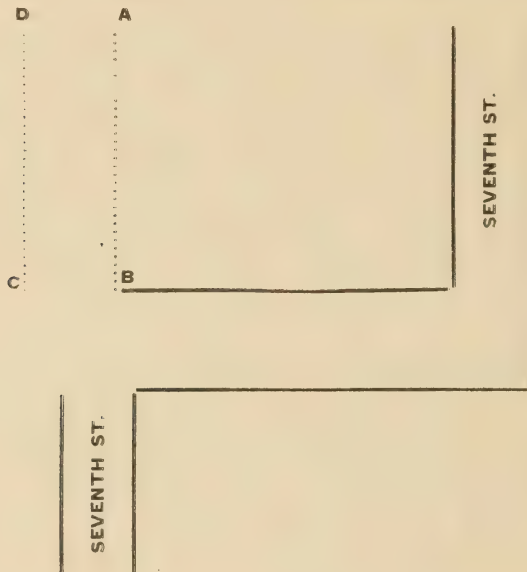
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such purposes may lay down under the streets, squares, and public places thereof, respectively, and along the bridges leading thereto, respectively, all necessary metal or other gas pipes for the conveyance of gas, and shall have power at all times, and from time to time, to open up and dig up all and any of the streets, squares, or public places in the City of Ottawa, and the Villages of New Edinburgh and Hull, or any of them, for the purpose of repairing any of their works, plant or pipes, or for the purpose of laying down others instead thereof, or extending and laying down new plant or pipes."

Under the powers given by that section the company laid down pipes etc. in Seventh street, then in the Township of Gloucester: this territory afterwards became part of the City of Ottawa, and the street became Hawthorn avenue. The street had a jog in it.



The city corporation, desiring to straighten it, bought land as indicated by the dotted lines A B, C D, passed a by-law closing the jog, and opening the street through. The company thereupon took up their pipes etc. and relaid them on the new line. The cost of this being claimed by way of compensation, an arbitrator has allowed the claim. The city corporation now appeal.

I am of opinion that in any case the compensation allowed is

excessive: but I do not proceed on that ground, thinking the claim wholly fails.

The rights of a gas company in respect of its mains etc. have been considered by the Privy Council in the well-known case of *Toronto Corporation v. Consumers' Gas Co.*, [1916] 2 A.C. 618. There the company was incorporated under (1848) 11 Vict. ch. 14, which, by sec. 13, enabled the company "to break up, dig and trench so much and so many of the streets, squares and public places of the said City of Toronto as may at any time be necessary for the laying down the mains and pipes to conduct the gas from the works of the said company to the consumers thereof, or for taking up, renewing, altering or repairing the same when the said company shall deem it expedient, doing no unnecessary damage in the premises, and taking care as far as may be to preserve a free and uninterrupted passage through the said streets, squares and public places while the works are in progress, and making the said openings in such parts of the said streets, squares and public places, as the City Surveyor, under the direction of the council of the said city, shall reasonably permit and point out."

The Judicial Committee held that "once the pipes were laid by statutory authority, then they, in fact, became *partes soli*" (p. 621), "as much 'land' as the highway itself or any other part of the soil beneath" (p. 622).

There are then the two freeholds—that of the company in their pipes, with all the incidents thereto either at the common law or by statute, and that of the city corporation in the soil etc., which is limited by the rights of the company: Municipal Act, R.S.O. 1914, ch. 192, sec. 433*; *Roche v. Ryan* (1892), 22 O.R. 107; *Cotton v. City of Vancouver* (1906), 12 B.C.R. 497.

I do not think that the city corporation can by any act affect the rights of the company in any particular—whatever rights the company had before the by-law closing the street they still have.

The power of "stopping up" is given by R.S.O. 1914, ch. 192, sec. 472 (1) (c), "stopping up any highway or part of a highway and

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*433. Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation . . . of the municipality . . . the council . . . of which for the time being have jurisdiction over it under the provisions of this Act.

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for leasing or selling the soil and freehold of a stopped up highway or part of a highway." The mere stopping up of the highway here cannot deprive the company of the means of ingress or egress—if it did, the by-law is not yet operative: sec. 473 (2).

And, if and when the city corporation come to "sell the soil and freehold," they will sell only what they have, and therefore will not interfere with the company's rights.

That for their own purposes the company have taken up the pipes from the old position and laid them down in the new street, is no concern of the city's—the city did not compel it or request it but simply did not interfere with the company doing it. If I could have come to the conclusion that the right of the company to retain their pipes in the original position ceased with the stopping up of the street, I should also consider that the company have no rights after such stopping up, and that the statutory rights were subject to be determined by the stopping up—in other words, that the company had a terminable fee, which came to an end on the stopping up becoming effective. The company would then have no right to compensation more than a tenant at will would have if the city corporation terminated the tenancy by their will.

I would allow the appeal with costs.

BRITTON and MIDDLETON, JJ., agreed in the result.

Appeal allowed.

[APPELLATE DIVISION.]

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June 13.

PARSONS V. TORONTO R.W. CO.

Negligence—Collision between Plaintiff's Automobile and Street-car in Highway—Injury to Plaintiff—Negligence of Driver of Street-car—Negligence of Plaintiff—Speed of Street-car—Findings of Jury—Want of Control—Duty of Driver of Street-car—Proximate Cause of Collision.

The plaintiff's motor-car was standing facing east on the south side of a highway upon which the defendants' tracks were laid and their street-cars ran. The plaintiff started his car from the kerb with the intention of turning north across the tracks and going west; one of his wheels came upon the south track, where it was struck by a car of the defendants coming from the west; he saw the street-car before he started, and judged it to be about 150 yards west; the driver of the street-car also saw the plaintiff's car; the plaintiff was injured, and sued for damages. At the trial the jury found: (1) that there was negligence on the part of the defendants' motorman which caused the collision; (2) that that negligence consisted "in that he did not have his car under control to stop in case of an emergency;" (3) that there was negligence on the part of the plaintiff which caused or contributed to the collision; (4) that that negligence was, "He misjudged the distance the street-car was from him when he started from the kerb;" (5) that, notwithstanding the negligence of the plaintiff, the defendants' motorman could, by the exercise of reasonable care, have prevented the collision; (6) to the question, "What should he have done which he did not do or left undone which he did?" the jury answered, "He should have had his car under control."—

Held, that judgment was properly entered for the plaintiff upon these findings.

Per MEREDITH, C.J.C.P.:—The negligence of the plaintiff did not prevent him from succeeding in the action, because, notwithstanding such negligence, the defendants might, by the exercise of ordinary care, have avoided injuring him. It is a breach of that duty, owed to the negligent, and that alone, which gives the right of action.

Per RIDDELL, J.:—If the motorman was running his car at so great a speed that he could not, by the exercise of proper care, avoid the result of a negligence of the plaintiff which might be anticipated, this excessive speed was in itself the efficient, the proximate, the decisive cause of the accident, and the contributory negligence of the plaintiff did not neutralise its effect.

Brenner v. Toronto R.W. Co. (1907-8), 13 O.L.R. 423, 15 O.L.R. 195, 40 Can. S.C.R. 540, *British Columbia Electric R.W. Co. v. Loach*, [1916] 1 A.C. 719, and *Columbia Bitulithic Limited v. British Columbia Electric R.W. Co.* (1917), 55 Can. S.C.R. 1, discussed.

AN appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of York, upon the findings of a jury, in favour of the plaintiff, in an action, brought in that Court, to recover damages for injuries sustained by him when a motor vehicle which he was driving was struck by a street-car of the defendants.

The plaintiff alleged negligence on the part of the employees of the defendants in charge of the car.

The questions given to the jury and the answers thereto were as follows:—

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"1. Was there any negligence on the part of the defendants or their motorman which caused the collision? A. Yes.

"2. In what did such negligence consist? A. In that he did not have his car under control to stop in case of an emergency.

"3. Was there any negligence on the part of the plaintiff Parsons which caused or contributed to the collision? A. Yes.

"4. In what did such negligence consist? A. He misjudged the distance the street-car was from him when he started from the kerb.

"5. Notwithstanding the negligence, if any (if you find the plaintiff negligent in any way)—notwithstanding that negligence of the plaintiff Parsons, could the defendants' motorman, by the exercise of reasonable care, have prevented the collision? A. Yes.

"6. Could the motorman, by the exercise of reasonable care, have prevented the collision, and, if so, what should he have done which he did not do or left undone which he did? A. He should have had his car under control."

May 27. The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., BRITTON and RIDDELL, JJ.

D. L. McCarthy, K.C., for the appellants, argued that they could not be made liable on the findings: the jury had found the same negligence, namely, the high speed of the car, to be the primary negligence and the ultimate negligence. He referred to *Brenner v. Toronto R.W. Co.* (1907-8), 13 O.L.R. 423, 15 O.L.R. 195, 40 Can. S.C.R. 540.

R. McKay, K.C., for the plaintiff, respondent, contended that the primary and ultimate negligence was the excessive speed. The case of *British Columbia Electric R. W. Co. v. Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4, covered this case completely. The lack of control of the car due to the excessive speed was the negligence which caused the accident. Counsel also referred to *Columbia Bituminous Limited v. British Columbia Electric R. W. Co.* (1917), 55 Can. S.C.R. 1, 37 D.L.R. 64.

McCarthy, in reply.

June 13. MEREDITH, C.J.C.P.:—The case, as it appears to me, is not one in which any question of primary, secondary, and tertiary negligence arises: it is simply a case of negligence on the

part of the plaintiff which does not prevent him from succeeding in this action, because, notwithstanding such negligence, the defendants might, by the exercise of ordinary care, have avoided injuring him. It is a breach of that duty, owed to the negligence, and that alone, which gives the right of action.

The jury seem to have dealt intelligently and accurately with the case in finding the plaintiff guilty of a breach of the duty which he owed to the defendants, in putting himself and his car and their car and its passengers and crew, in danger, by moving out of a place of safety into a place of danger upon the defendants' tracks and in front of their oncoming car without any reason for doing so beyond a disinclination to wait, as ordinary care demanded, until the street car had passed and the way was safe; and also in finding that, notwithstanding the plaintiff's negligence, the defendants might, by the exercise of ordinary care, have avoided the injury which they inflicted upon him.

They cannot excuse themselves, in such a case as this, from that duty by shewing that, owing to their own prior want of ordinary care, they had deprived themselves of the power to perform the duty they owed to the plaintiff.

The case is quite different from one in which the negligence of each is, for instance, the neglect to see the other and the danger into which each is running. In such a case the neglect of each may very well be set off against that of the other; and another duty arises only when the danger is realised and can be averted by the exercise of ordinary care—that which is ordinary care having regard to all the circumstances; and that duty is applicable to each alike—the third and, as to liability, concluding negligence.

Much was said upon the argument of this appeal, and indeed much is said in many cases of negligence here now, about the case of *British Columbia Electric R.W. Co. v. Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4; but I am unable to perceive that it is at all applicable to this case. It is said that it may be that it is not, but that it overrules the judgments in favour of the defendants in the case of *Brenner*, in the provincial and federal Courts here; and that, if that case was wrongly decided, this case was rightly decided at the trial. But I cannot consider that that case has been in any sense overruled, nor see that it in any sense stands in the way of the plaintiff in this case. It is true that the learned Judge who

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spoke for the Judicial Committee of the Privy Council, in pronouncing judgment in the case of *Loach*, said that the facts of the case of *Brenner* were closely similar to those of the case he was dealing with; and it is also true that the defendants failed in the one and succeeded in the other; but, so far as overruling is concerned, the cases could hardly be more dissimilar. In the case of *Brenner*, the jury's findings were altogether in favour of the defendants: they found no negligence of the defendants; in the case of *Loach*, they were altogether in favour of the plaintiff. In the case of *Brenner*, the single question was, whether the plaintiff should have a new trial on the ground that the trial Judge had misdirected the jury as to the effect of the defendants' rule regulating the running of their cars as evidence at the trial: in the case of *Loach* the single question was whether the defendants should have the judgment upon, or notwithstanding, the findings of the jury. It needs much more than anything said in the case of *Loach* to throw any doubt upon the accuracy of the judgments in the case of *Brenner*, in the mind of any Judge of any of the Courts of this Province; a judgment with which the parties were apparently ultimately content, at all events they went no further, and which has, nowhere hitherto, met with disapproval; I speak of the case itself, not any "abstract" question of law, not affecting the question of misdirection, discussed in the Divisional Court; nor is it likely to be by those who take the trouble to know what it was all about and what was decided in it, not to speak of what the evidence in it really was.

I am in favour of dismissing the appeal.

MAGEE, J.A., agreed that the appeal should be dismissed.

RIDDELL, J.:—The plaintiff, driving a Ford touring car on the afternoon of the 5th June, 1918, stopped on the south side of Dundas street, a few feet behind another motor-car, in order to make some purchases in a shop adjoining—his car was of course facing east. Coming out of the shop, he looked to the west and saw a street-car some 250 to 300 yards away: he then passed around the back of his car and entered it on the north or left side. Before starting his car, he looked in the mirror, and judged the street-car then to be about 150 yards west, although he says it

was impossible to judge correctly by looking in the mirror. He then started up his car to pass around the car which was immediately in front, and therefore returned to the north. In this way he placed the left wheel of his car on the railway track, although apparently there was room for him to pass between the standing car and the rail. He had got up speed of some 8 to 10 miles an hour, and had turned to the right or south in front of the standing car, when he was struck by the street-car and driven some 18 or 20 yards against a trolley-pole.

The evidence for the plaintiff indicates that the street-car was going very fast, at all events from 20 to 25 or 30 miles an hour: the evidence for the defence makes it much less, but apparently the jury accepted the figures of the plaintiff's witnesses.

Upon an action being brought and coming on for trial, the following questions were submitted to the jury, to which they returned the answers thereto annexed (as set out above).

The learned Judge (Judge Winchester) of the County Court of the County of York thereupon directed judgment to be entered in favour of the plaintiff with costs.

The defendants now appeal.

The main—indeed the only—ground of appeal is that the jury have made the same negligence answer for primary negligence and ultimate negligence, that is, that the only negligence found is the great speed at which the street-car was going.

It seems to me to be the fair result of the cases in the Judicial Committee and in the Supreme Court of Canada, *British Columbia Electric R.W. Co. v. Loach*, [1916] 1 A.C. 719, 23 D.L.R. 4, and *Columbia Bitulithic Limited v. British Columbia Electric R.W. Co.* (1917), 55 Can. S.C.R. 1, 37 D.L.R. 64, that, if the motorman was running his car at so great a speed as that he could not, by the exercise of proper care, avoid the result of a negligence of the plaintiff which might be anticipated, then this excessive speed was in itself the efficient the proximate, the decisive cause of the accident, and that the contributory negligence of the plaintiff does not in law at all neutralise its effect.

It seems to me that it is not necessary to discuss previous cases in our own or in the English Courts: our duty is loyally to follow the *ratio decidendi* of decisions of Courts by whose decisions we are bound.

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It is quite true that in the case in the Privy Council there was another negligence which was considered the ultimate negligence, differing from that which was considered the primary or original negligence: it is also true that in the case in the Supreme Court the majority of the Court of Appeal in British Columbia and also the Supreme Court of Canada considered the same state of affairs to exist; but the reasoning of the Courts, as it seems to me, compels us to hold that if the accident was due to the excessive speed preventing the stopping of the car in time, the defendants would not be excused.

In the present case, I think that the jury intended to find that the motorman failed to stop his car by reason of the fact that he was going too fast; and, if that was so, the defendants are liable. I can see no kind of difference between sending a car out without proper brakes and running a car at such a speed that proper brakes are useless.

The much canvassed case of *Brenner v. Toronto R.W. Co.*, 13 O.L.R. 423, 15 O.L.R. 195, 40 Can. S.C.R. 540, was just such a case as this, and I think the result of the cases in the Judicial Committee and the Supreme Court of Canada is to hold that the judgment of the Divisional Court in that case is good law.

It may be that the last word has not yet been said in such cases; but, as the authorities stand, I am of the opinion that this appeal should be dismissed.

BRITTON, J., agreed with RIDDELL, J.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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REX V. AVON.*

Criminal Law—Keeping Disorderly House—Summary Trial and Conviction by Police Magistrate—Procedure—Defects and Irregularities—Sentence—Imprisonment for one Year in Reformatory—Power of Magistrate Exceeded—Conviction and Warrant of Commitment Adjudged Bad—Habeas Corpus—Proceedings in Magistrate's Court not Brought up on Certiorari—Power to Amend Conviction and Warrant by Reducing Term and Changing Place of Imprisonment—Criminal Code, secs. 1124, 754—Direction to Magistrate under sec. 1120.

The order of MIDDLETON, J., in Chambers, *ante* 383, directing an amendment of the conviction of the defendant so as to make it proper in form and so as to reduce the sentence imposed to imprisonment in the common gaol for six months, and directing that a proper warrant be issued in accordance with the amended conviction and placed in the hands of the gaoler, was reversed; and an order was made by the Court directing the discharge out of custody of the defendant.

Held, by MEREDITH, C.J.C.P., and MAGEE, J.A., that, the warrant and conviction not being properly before the Judge in Chambers and not having been removed by *certiorari*, he had no power, under secs. 1124 and 754 of the Criminal Code or otherwise, to change the warrant or conviction; without the change the warrant was bad, and the conviction also, the sentence being illegal; and, having regard to the manner in which the defendant was tried and convicted, the Court should not act under sec. 1120 and direct the magistrate to impose a proper punishment.

Rex v. Frejd (1910), 22 O.L.R. 566, 18 Can. Crim. Cas. 110, referred to.

Per MEREDITH, C.J.C.P.:—The latter part of sec. 1124 permits a correction of excess of punishment only by one who has really tried the case. That section gives only the power conferred by sec. 754 upon a court of appeal on an appeal from a summary conviction under sec. 749; and that power is to impose punishment after trial only—a new trial upon the appeal.

Per RIDDELL, J.:—The power, if any, to amend the warrant, comes from sec. 1124, and that section has been held not to cover a case of summary trial: *Rex v. Shing* (1910), 17 Can. Crim. Cas. 463, 20 Man. R. 214; and, in any event, the power of amendment is given only where the conviction or warrant has been removed by *certiorari*. *Certiorari* could not be allowed at this stage.

The defects and irregularities in the proceedings before the magistrate discussed.

AN appeal by the defendant from the order of MIDDLETON, J., *ante* 383.

May 27. The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., BRITTON and RIDDELL, JJ., and FERGUSON, J.A.

R. L. McKinnon, for the appellant, argued that the proceedings against the prisoner were irregular and unwarranted from the beginning. When the writ of *habeas corpus* was served, the

*The defendant's name was really *Avian*. In the former report of the case it was spelled *Avon*, and that spelling is adhered to in order to avoid confusion.

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prisoner was detained upon a warrant of commitment bad upon its face as containing neither conviction nor adjudication for any offence, and directing imprisonment beyond the powers of the magistrate. Subsequently two other warrants were delivered by the magistrate to the gaoler, both of which were equally bad. Counsel submitted that the powers of amendment exercised by the learned Judge below were not open to him: *Rex v. Nelson* (1908), 18 O.L.R. 484; *In re Timson* (1870), L.R. 5 Ex. 257. The magistrate had no power to impose a penalty in excess of that provided by the Criminal Code: *Rex v. Shing* (1910), 17 Can. Crim. Cas. 463, 20 Man. R. 214. This Court had power to look at the proceedings before the magistrate, and, if they were irregular, or if there was no evidence of the offence charged, should quash the conviction: *Rex v. Cross* (1918), 14 O.W.N. 7, 29 Can. Crim. Cas. 349.

J. R. Cartwright, K.C., for the Crown, contended that, if an illegal penalty was imposed, the Judge in Chambers had power to amend: sec. 1124 of the Criminal Code; *Rex v. Crawford* (1912), 20 Can. Crim. Cas. 49, 6 D.L.R. 380. True, the powers of amendment were given only when the conviction was before the Court upon a *certiorari*. But the intention of the Legislature should be looked at; and that intention was, that a guilty person should not escape punishment by reason of a magistrate's error. If the Judge in Chambers was wrong, the conviction, of course, could not stand.

McKinnon, in reply.

June 13. MEREDITH, C.J.C.P.:—Upon the opening of this appeal, the prosecution and conviction and sentence of the prisoner seemed to me so full of substantial errors that I was impelled to suggest that, with the consent of all concerned in the appeal, the prisoner be discharged from custody: but that suggestion was not acted upon, and it may be that it is better that it was not: better that attention should be pointedly called to such errors and to the need of proceeding with care in the administration of justice in criminal cases, and the observance of the requirements of the law, before turning any one from a free person into a convict. Speedy justice is commendable in the administration of all laws; but care must be taken that speedy justice in name is not made speedy injustice in fact.

To answer charges of errors of all sorts with the assertion that the convict was guilty anyway, is to evade the charges and to state that which is untrue, for no one is guilty in the eyes of the law until convicted in the manner provided for in the laws. There must be first a fair trial: a trial in the manner fully set out in the Criminal Code, which gives power to convict only after such a trial.

It used to be commonly said that in criminal cases "form is substance;" and it should yet be said that all substantial matters of procedure in criminal cases are matters of substance: and often, though apparently not often enough, these words, of a very eminent Judge in modern times, are quoted: "In criminal matters the question is not alone whether substantial justice has been done, but whether justice has been done according to law. . . . A party accused has the right to insist upon them as a matter of right, of which he cannot be deprived against his will; and the Judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion." These words do not conflict with the provisions of the Criminal Code in regard to irregularities, informalities, and insufficiencies in convictions, etc., which are not to vitiate them: they apply with full force to such errors as those which were made in this case.

The prisoner, who attended a police court as a mere spectator of an investigation of a charge of murder made against one of his fellow-countrymen, found that that investigation was not to be then made; but also found himself, without information, summons, or warrant, immediately tried and convicted of a grave offence and sentenced to one year's imprisonment at hard labour in the Ontario Reformatory.

One naturally looks for some extraordinary circumstances making such an extraordinary proceeding necessary: but one looks in vain; indeed only circumstances which make it less excusable are found. The man was a foreigner—an Italian—so unfamiliar with the English language that the magistrate called upon an interpreter to explain to him the nature of the charge upon which he was being tried: he was also a householder in the municipality and a married man; so that there was no reason why any proceedings should be taken against him improperly or with undue haste.

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It is not admitted that no information was laid before the trial; it was suggested that an information was laid immediately before the trial began; but, from the magistrate's depositions, I have no difficulty in finding that that is not so, that the information was taken after the man was convicted. In his depositions the time of the taking of the information is dealt with thus:—

"Q. When was this information sworn? A. I can't say.

"Q. Was it on the 1st April or prior thereto? A. I have no idea.

"Q. Well, before Luigi Avian (or Avon) was tried on the 1st April was there an information sworn to before you by Thomas M. Greenaway? A. I can't say that: I can't begin to remember the informations that are sworn before me.

"Q. Well, you remember trying Luigi Avian? A. I do.

"Q. On the 1st April? A. I am not sure of the day now.

"Q. But you can't swear whether prior thereto Greenaway did swear before you an information charging Avian with keeping a disorderly house? A. No, I can't swear whether he had or not."

Upon such testimony and in the absence of some such answer as, "I never take, I never took, any information after a trial," I can come to no other conclusion than that which I have already expressed as to the time when this information was taken.

I have seen it stated in one of the reported cases that Part XVI. of the Criminal Code does not provide for informations: but as generally, criminal trials can be had only in the presence of the accused, and as the means of enforcing attendance is ordinarily a summons or warrant issued on an information, an information must be generally necessary; and, besides that, the Criminal Code so provides. No one should be unfamiliar with the care which the criminal law requires to be taken before any one is put upon trial: the jury system shews that the grand jury being yet an essential part of the criminal Courts. Equal care is required of magistrates. They are bound to take care that no one is unduly prosecuted.

"Upon receiving . . . complaint or information the justice shall hear and consider the allegations of the complainant, and if of opinion that a case for so doing is made out, he shall issue a summons, or warrant, as the case may be, in manner herein-after provided.

"2. Such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without a warrant:" The Criminal Code, sec. 655.

The immediately preceding sections make provision for the laying of the information or complaint, and those immediately following relate to the manner in which the summons or warrant is to be issued, one of such provisions (658 (3)) being that "no summons shall be signed in blank:" see also secs. 710 and 711. Why Part XVI. does not provide for informations should be obvious: it deals with trials, taking up the case when the accused person is before the Court; and so sec. 798 must apply after that time.

I deem it needful to direct attention to these elementary matters more in the interests of the due administration of justice in criminal cases generally than for their direct bearing upon this case; and the need for chief magistrates to do so is made very evident by the admission, given in the proceedings in the case, that a police magistrate had given to a police court clerk a rubber stamp from which a facsimile of the magistrate's signature might be impressed upon such summonses as the subordinate officer might see fit to issue, the stamp being given for the purpose of enabling the subordinate to do so. A perusal of such cases as *Ex p. Lewis* (1888), 21 Q.B.D. 191, should give a better knowledge of the nature of such a judicial act as determining whether or not a summons should be issued.

Two methods by which jurisdiction over an accused person may be acquired have been mentioned; and it may be well now to mention the others. Apprehension without a warrant in cases in which the law permits it. In such cases the Criminal Code provides that: "No person who has been so apprehended shall be detained after noon of the following day without being brought before a justice:" sec. 652 (2). And, lastly, when the accused is "voluntarily" before the justice "or while in custody for the same or any other offence:" sec. 668.

In the much discussed case of *Regina v. Hughes* (1879), 4 Q.B.D. 614, it was held, the Lord Chief Baron dissenting, that a charge of perjury would lie for false swearing before a magistrate

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trying a charge without any information, but that it would lie, according to Hawkins, J., who delivered the principal judgment in it, though "it follows that the magistrate who issued the warrant, and the defendant who with knowledge of the illegality executed it, were liable to an action for false imprisonment. If authority were wanting for this, I need but refer to *Caudle v. Seymour* (1841), 1 Q.B. 889; *Morgan v. Hughes* (1788), 2 T.R. 225, 231, *per* Ashurst, J.; *Stevens v. Clark* (1842), 1 Car. & M. 509, 2 Moo. & Rob. 435:" see also the earlier cases collected in Paley on Convictions, 7th ed., p. 72.

To say that the prisoner was voluntarily before the magistrate, or that he waived any of his rights, would be to say that which is manifestly untrue. The man did not know enough of the English language or of Canadian law to waive anything of the kind.

There was, of course, a reason for the prosecution, and it seems to have been this: the magistrate had been investigating a charge in respect of immoral conduct on the part of a girl, and, having failed to convict the men involved in it, turned his guns on the prisoner, the immoral conduct having been said to have taken place in the prisoner's house. And, besides that, the magistrate was under the mistaken impression that the prisoner was a man who had sought advice from him—the magistrate—as a solicitor, some days before, regarding the keeping of a house of ill-fame.

But a trial begun and concluded so unfairly was hardly likely to end well. The magistrate, although he assumed "absolute jurisdiction" over the case, not giving the man a choice of trial by jury, proceeded, after convicting him, to pass sentence upon him as if he had been tried by a jury, and to impose upon him the severest penalty possible in such a case: though the limit under his absolute jurisdiction was only about half as much: and then fell into the further error of adjudging imprisonment in the Ontario Reformatory, for a definite term, although both federal and provincial legislation permit only "an indeterminate period:" see the Ontario Reformatory Act, R.S.O. 1914, ch. 287, sec. 19; and the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, sec. 44 (enacted by 3 & 4 Geo. V. ch. 39, sec. 1 (Dom.))

Nor was such a trial, and conviction, likely to go long unchallenged. On the 4th April, 1919, a writ of *habeas corpus* was obtained; and notice of motion for the discharge of the prisoner

was given on the next following day: but a fatality of mistakes seems to have still followed the case here also. The writ does not seem to have been served upon any one: nor does any return to it seem ever to have been made; but, on the motion for the discharge of the prisoner, affidavits by, and on behalf of, the prisoner were filed in support of the motion, and by the magistrate in opposition to it, and he was cross-examined, on his affidavit, and his depositions, so taken, were also used upon the motion.

The learned Judge at Chambers, who heard the motion, after consideration, ruled that the punishment inflicted was greater than the magistrate had power to inflict, but ruled also that he had power to order an amendment of the conviction so as to impose a penalty which was within the magistrate's power, and the issue of a new warrant of commitment in accordance with the amended conviction, and to remand the prisoner to the custody of the gaoler to be held under the new warrant: and an order was issued accordingly, on the 25th April, 1919.

The learned Judge had no such power upon the application before him: but, considering that he might direct the issue of a *certiorari*, and that, upon the conviction and warrant being so brought up, he would have power to impose the new punishment, took the short course of doing that without having the papers regularly so brought before him: adding the observation that the papers were already actually before him.

These papers are also among those sent from Chambers to this Court, with the papers properly on file there. There is nothing indicating how these important writings, upon which the prisoner's liberty depends, were taken from their proper custody and made use of in Chambers: but I gather, from something said in the depositions of the magistrate, that they were sent from Guelph to counsel, in Toronto, who opposed the motion for the discharge of the prisoner, and, though not filed, must have been handed in by him. But by whatsoever irregular means the papers were taken from their proper place of custody, which, under sec. 793 of the Criminal Code, is "among the records of the general or quarter sessions of the peace" of the County of Wellington, they were not properly before the Judge at Chambers, and are not properly here; and, even if they had been, they were not there nor are they here "on being removed by *certiorari*," and there-

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fore there was no power to rectify an error, as the Judge in Chambers purported to do, under sec. 1124 of the Criminal Code.*

If they had been, my own opinion would have been: that the latter part of the section permits a correction of excess of punishment only by one who has really tried the case; such only can be in a position to impose a just punishment; to do so on such fragmentary evidence as was improperly before the Court in this case, would be to do so under the greatest disadvantages, if indeed doing it could be really more than doing it by a guess. That which is conferred is only the power conferred by sec. 754 of the Criminal Code upon a court of appeal from a summary conviction under sec. 749; and that power is to impose punishment after trial only—a new trial upon the appeal. If there were but one punishment which could be inflicted, a new trial would not be necessary; but, where there may be almost as many different degrees of punishment between minimum and maximum as any one chooses to make, how is it possible, in such a case as this, to impose any punishment without knowing more about all those things which every one ought to take into consideration before sending any one to prison? Nor is there any kind of need for acting without the needed knowledge; for, under sec. 1120, whether it be in *habeas corpus* or *certiorari* proceedings or otherwise, an order may be made for the detention of the prisoner and directing the convicting justice “to take any proceedings, hear such evidence, or do such further act as in the opinion of the court or judge may best further the ends of justice.” A course invariably taken by me, since the case of *Rex v. Frejd* (1910), 22 O.L.R. 566, 18 Can. Crim. Cas. 110, was decided, having regard to the decisions contrary to the views I have expressed as to the effect of the latter part of sec. 1124: see *Rex v. McKenzie* (1907), 12 Can. Crim. Cas. 435.

*1124. No conviction or order made by any justice, and no warrant for enforcing the same, shall, on being removed by *certiorari*, be held invalid for any irregularity, informality or insufficiency therein, if the court or judge before which or whom the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence: Provided that the court or judge, where so satisfied, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by section 754 conferred upon the court to which an appeal is taken under the provisions of section 749.

In this case a sentence of one year in the Ontario Reformatory "at hard labour" was changed to one of six months in the common gaol at Guelph, apparently without hard labour: why not merely a change from one year to six months is not disclosed.

My conclusion is, therefore, that there was no power in the Judge at Chambers to change warrant or conviction; and that without the change the warrant is bad, as is the conviction also; and accordingly this appeal should be allowed, the order appealed against discharged, and an order directing the discharge out of custody of the prisoner should be made: unless we see fit, acting under sec. 1120, to direct the magistrate to impose a proper punishment: but that seems to me to be out of the question, having regard to the manner in which the man was tried and convicted: and, that being so, it is not needful to consider whether the magistrate ever had any jurisdiction over the man. To the oft-repeated assertion that the man is guilty any way, the obvious answer is made: that no one should be considered guilty, and treated as a convict, until he or she has had a fair trial. If the man were guilty on the day charged in this case, he must have been guilty on other days, and so a fair trial may yet be had if it be desired.

I am in favour of disposing of this appeal in the way which I have mentioned.

MAGEE, J.A.:—The prisoner, Luigi Avian (in the proceedings against him variously called Avan and Avon), was on the 1st April, 1919, convicted before the Police Magistrate at Guelph for having on the 28th March, 1919, kept a disorderly house, and was sentenced to one year's imprisonment in the Ontario Reformatory. The proceedings were very summary. He was under detention as a prospective witness in relation to a murder committed on the 30th March. A detective, one Greenaway, laid an information on the 1st April before the Police Magistrate against Luigi Avan, charging the keeping of the disorderly house. No summons or warrant was issued, but, while under detention in the police court in the other matter, he was called before the magistrate and by him told of the information and the material parts of it read to him. He was asked whether he pleaded "guilty" or "not guilty," and made some reply, which the magistrate took to be "not guilty." He is an Italian and speaks and understands

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English to some extent, but the Police Magistrate thought he did not properly understand the technical meaning of the term "disorderly house," and asked one Tantardini, an intelligent Italian of Guelph, who sometimes acts as interpreter at the police court, and who happened to be present, to explain to the prisoner what the charge meant, but the magistrate says he left it to Tantardini to explain it according to his own knowledge and did not explain it to Tantardini, who, he says, knew perfectly well. Tantardini, in an affidavit filed on the prisoner's behalf, says that the magistrate "asked me to say to the accused in the Italian language that he was charged with keeping a house with prostitutes in it—this I did, and the said Luigi Avon then replied that it was not true." The trial proceeded at once—witnesses were called for the prosecution, and the accused and two others who happened to be present in the court were examined for the defence. What purports to be a copy of the evidence certified by the magistrate is put in, but it erroneously states the date as the 7th April. No request appears to have been made for an adjournment or for opportunity to call additional evidence, though also it does not appear that the prisoner was asked if he was ready for his trial or if he wished to have counsel. Apparently some cognate charges against other persons were being inquired into before the magistrate on the same day—which probably accounts for the witnesses being on hand. The evidence against this prisoner seems to have fully warranted the accusation and a conviction, and the evidence for the defence only strengthened it.

The prisoner was taken to the common gaol at Guelph, under a warrant from the Police Magistrate, which did not state a conviction, but only a charge of keeping a disorderly house, and which directed that Avon be taken to the Ontario Reformatory at Burwash and there kept at hard labour for one year.

Thereupon application was made on Avon's behalf for a writ of *habeas corpus*, which was issued, and he gave notice of motion for his discharge. No formal return has been made to the writ, but the Crown produced the warrant, and with it two other warrants successively substituted for it, all dated the 1st April, 1919. The two latter each alleged a conviction and a sentence to the Reformatory for one year, but one of them directed conveyance to and custody in the common gaol "till thence delivered by due

course of law," and the other directed conveyance to and custody for one year in the Reformatory.

No proceedings for *certiorari* were taken, but the Crown produced the information and the copy of evidence, with wrong date already referred to, and a conviction and substituted conviction, both dated the 1st April, and adjudging one year's imprisonment in the Reformatory. These successive warrants and convictions and copy of evidence, although signed by the Police Magistrate, do not appear to have been prepared by him; but it is manifest that more careful supervision should have been exercised.

It is clear that, although sec. 228 of the Criminal Code authorises one year's imprisonment for the indictable offence of keeping a disorderly house, and sec. 773 gives the Police Magistrate jurisdiction, subject to the subsequent provisions of Part XVI. (secs. 774 to 799), which require the consent of the accused to hear and determine such a charge and charges of other offences summarily, and sec. 774 makes his jurisdiction on such a charge absolute without such consent, yet sec. 781 only gives the magistrate summarily trying such a case under sec. 773 authority to commit for a term not exceeding six months. Although he was exercising "the jurisdiction" under sec. 774, yet it is, I think, manifest that "the jurisdiction" mentioned in that section is the jurisdiction given by sec. 773, and, like it, is subject to the subsequent provisions, including sec. 781. This is perhaps confirmed by sec. 777, which gives the magistrate jurisdiction to try, with consent, any offence for which the accused may be tried at a court of general sessions of the peace, and which excludes in such case the application of sec. 781. The result is that the sentence of one year's imprisonment was not warranted by law.

Where a conviction or order made by any justice (which title here includes Police Magistrate under sec. 2 (18)) imposes punishment in excess of what is lawful, certain powers to deal with the case as seems just are given by sec. 1124; but that section is confined to cases where the conviction is removed by *certiorari*—and, whatever might be the effect if in fact all proceedings were already in this Court, here they are not so, and sec. 1124 is in consequence not available to prevent this conviction from being held invalid; and, in consequence, the order for amendment, the order appealed from, was not warranted.

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Section 1120 applies to proceedings upon *habeas corpus*, and authorises the Court to order the further detention of the accused and to direct the justice (or Police Magistrate) to take any proceedings, hear such evidence, or do such further act as, in the opinion of the Court, may best further the ends of justice. In *Rex v. Frejd*, 22 O.L.R. 566, 18 Can. Crim. Cas. 110, this section was acted on after an illegal conviction. But, even assuming that it would in the present case authorise a direction to the Police Magistrate to impose a proper sentence, the circumstances of the case, considering the hurried trial and the defendant's imperfect acquaintance with English and the disregard of proper carefulness in the proceedings and the imprisonment already undergone, do not appear to me to make it proper to do anything but direct the discharge of the prisoner.

RIDDELL, J.:—Luigi Avian was tried before Frederick Watt, Esquire, Police Magistrate for the City of Guelph, under the provisions of secs. 773 (f) and 774 of the Criminal Code, found guilty, and committed to the Ontario Reformatory at Burwash for one year.

On a writ of *habeas corpus* issuing, the matter came on before Mr. Justice Middleton, the 22nd April, 1919, and that learned Judge, on the 25th April, ordered as follows:—

"1. It is ordered that the conviction herein be amended so as to make it proper in form and so as to reduce the sentence imposed to imprisonment in the common gaol for six months.

"2. And it is further ordered that a proper warrant be issued in accordance therewith and placed in the hands of the gaoler.

"3. And it is further ordered that the accused be remanded to the custody of the gaoler and be held under the warrant to be issued on the amended conviction.

"4. And it is further ordered that as to this application there shall be no costs."

There were no proceedings in the way of *certiorari*, nor did the representative of the Crown ask for delay to take such proceedings.

The defendant now appeals.

The warrants of commitment are all for one year. Section 781 is express that when one is summarily tried under sec. 773 (f) the term of imprisonment cannot exceed six months; and, notwithstanding secs. 228 and 777, the magistrate had no power to impose

a longer imprisonment: *Rex v. Shing*, 17 Can. Crim. Cas. 463, 20 Man. R. 214 (Court of Appeal for Manitoba).

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The question then arises whether the Court can amend the warrant.

There is no pretence that this could be done at the common law. There have indeed been cases in which the Courts have enlarged the argument of motions for discharge to allow a new and valid warrant to be obtained from the magistrate, but there was no power in the Court to amend.

The power, if any, comes from sec. 1124 of the Code—that section has been held by the Court of Appeal of Manitoba not to cover a case of summary trial: *Rex v. Shing, supra*; and, in any event, the power of amendment is given only “on being removed by *certiorari*.”

Mr. Cartwright suggested but did not urge that *certiorari* should now be allowed, but it is plain that that could not be allowed at this stage: *In re Timson*, L.R. 5 Ex. 257; *Rex v. Nelson*, 18 O.L.R. 484; *Regina v. Chaney* (1838), 6 Dowl. 281.

I am of opinion that the appeal should be allowed and the prisoner discharged.

Many irregularities (to use the mildest term) appear in the proceedings, and I am induced to repeat what was said in *Rex v. Nelson*, 18 O.L.R. 484, at pp. 486, 487:—

“It has recently been decided that in cases of this kind there is no power to impose terms, and I should not do so if I could. As was said in *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317, at p. 341: ‘We must not look for ideal accuracy, for literal compliance with directions—it is a rare occurrence that an officer will do exactly what he is told, in exactly the way he is told to do it. No matter how carefully directions may be given, given in writing, repeated, and re-repeated, it is practically hopeless to expect them to be precisely complied with. In this work-a-day world we must not be too particular—we must be satisfied with substantial compliance with directions.’ But it cannot be too much to expect a paid, salaried magistrate of a large and populous territory to pay some attention to form, especially in a matter involving the incarceration for months of a fellow-citizen.”

BRITTON, J., and FERGUSON, J.A., agreed in allowing the appeal.

Appeal allowed.

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[APPELLATE DIVISION.]

June 13.

BROWN V. WALSH.

Contract—Sale of Goods—Failure of Buyer to Carry out Contract—Money Paid on Account of Price—"Deposit"—Forfeiture—Intention of Parties—Return of Money, less Damages Sustained by Seller.

Money paid by a purchaser who ultimately fails to carry out his contract belongs to the seller only if the purchaser has agreed that it shall; and, even in such a case, the Court may relieve against a forfeiture. The measure of damages for breach of a contract is the loss directly and naturally resulting, in the ordinary course of events, from the breach: the Court has no power to add a penalty.

The defendant agreed with the plaintiff to sell to him one car-load of iron and steel. In the writing evidencing the agreement it was said that \$60 had been "deposited on this contract," and that "before loading this iron" the plaintiff "will pay \$40 on contract." The two sums were paid by the plaintiff, and part of the goods was delivered and paid for—the remaining goods were not delivered, and were resold by the defendant, because the plaintiff failed to carry out his agreement to purchase:—

Held, that the \$100 paid should be returned, less such damages as the defendant had sustained by reason of the plaintiff's breach of the contract.

Neither party intended a forfeiture, and that was conclusive.

Howe v. Smith (1884), 27 Ch.D. 89, and *Walsh v. Willaughan* (1918), 42 O.L.R. 455, distinguished.

Steedman v. Drinkle, [1916] 1 A.C. 275, and *Brickles v. Snell*, [1916] 2 A.C. 599, applied.

APPEAL by the plaintiff from the judgment of the Judge of the County Court of the County of Huron, dismissing an action brought by the buyer to recover \$135 damages for breach of a contract for the sale of goods, and \$100 paid by the plaintiff on account of the price of the goods, in pursuance of the contract. The trial Judge treated the \$100 as forfeited.

May 27. The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., BRITTON, J., and FERGUSON, J.A.

R. C. H. Cassels, for the appellant, said that the only claim made on this appeal was for the \$100 paid to the defendant. He contended that the learned trial Judge was wrong in decreeing that the money should be forfeited. The defendant might be entitled to retain it if the parties had so agreed, but they had not; or the defendant might be able to recover damages for breach of contract if such were proved; but he had no right to retain this money as a penalty. The Court would relieve against such a forfeiture: *Steedman v. Drinkle*, [1916] 1 A.C. 275, 25 D.L.R. 420.

L. E. Dancey, for the defendant, respondent, argued that the appellant, being in default under his contract, could not recover this money. The deposit, though to be taken as part payment if the contract was completed, was also a guaranty for the performance of the contract; and, when the appellant failed to perform his part, he lost his right to the return of the deposit: Benjamin on Sale, 5th ed., p. 954; *Howe v. Smith* (1884), 27 Ch. D. 89.

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Cassels, in reply.

June 13. The judgment of the Court was read by MEREDITH, C.J.C.P.:—The defendant agreed with the plaintiff to sell to him. "One car cast iron and stove plate mixed and all wrought iron and steel and malleable, price \$22 per ton for cast and stove plate, \$17 for wrought and steel and malleable, f.o.b. Blyth." Two writings evidencing the agreement were made, one signed by the plaintiff and the other by the defendant, and in each it was said that there had been "deposited on this contract that is to say \$60 on the balance of iron left in yard f.o.b. when loaded on car," and that "before loading this iron" the plaintiff "will pay \$40 on contract."

The iron was to be "loaded in January," but afterwards that was changed by the parties, and in the writing signed by the plaintiff the word "January" was struck out and the word "February" was written over it.

The \$60 were paid when the agreement was made, and the \$40 were also paid "some time in January."

The whole of the cast iron and stove plate was delivered to a purchaser of it from the plaintiff, the plaintiff being present, and the full price of it was paid by the sub-purchaser to the defendant.

The rest of the goods were never delivered to the plaintiff, and eventually the defendant sold and delivered them, at the same price and on the same terms as agreed with the plaintiff, to another purchaser, and was paid for them by him.

This sale was made because the plaintiff failed to carry out his agreement to purchase; and in making the sale the defendant was quite within his legal rights and acted reasonably in the interests of the plaintiff as well as of himself.

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The plaintiff's action, for damages for breach of contract to deliver the second lot of the goods, failed in fact; and the only question which remained was: What were the rights of the parties in regard to the \$100 paid by the plaintiff to the defendant, as I have already mentioned? The trial Judge considered the money forfeited, and dismissed the action altogether: and this appeal is really one against that ruling only.

The learned trial Judge seems to have thought that all money paid by a purchaser, who ultimately fails to carry out his contract, belongs to the seller: but, of course, that is not so.

The seller can become entitled to it only if the purchaser has agreed that he shall; and, even in such a case, the Court may relieve against a forfeiture.

The measure of damages for breaches of contracts is the loss directly and naturally resulting, in the ordinary course of events, from the breach. There is no power in the Courts to add a penalty: as in some actions for wrongs there may be.

The Court's first duty is therefore to find whether there was in fact any agreement that the payments which were made should be the seller's if the purchaser failed to carry out the contract: and there is no evidence of any such agreement: the defendant's own testimony proves the contrary: he was willing to repay the money, but had it not, and offered goods instead. No assertion of any such right as is now contended for on his behalf was thought of until the matter came into solicitors' hands.

Dealing with the case upon principle only, I cannot doubt that the money paid should be returned, less such damages as the defendant is proved to have sustained by reason of the plaintiff's breach of the contract. Quite too little effort was made to shew what loss the defendant had really sustained; but, upon such facts as were proved, there can be no doubt that the sum of \$25 should well compensate the defendant. He lost the use of the purchase-money, less the \$100, for a few months, and he seems to have gone to some little expense in efforts to induce the plaintiff to accept and pay for the goods, and also in procuring another purchaser.

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But it is said that the cases are against this view of what the law should be and is: and, as usual, the case of *Howe v. Smith*, 27 Ch. D. 89, is mainly relied upon: but in that case the question was treated as one of contract, one of fact, whether the purchaser had agreed that the seller should retain the payment made, if the plaintiff failed to carry out the contract: and the Court came to the conclusion, as a matter of fact, that he had. How can any such finding be made in this case, in the face of the defendant's admission, and his readiness to repay? The question being a question of fact, no case is binding in any other; and it is always to be borne in mind that, in matters of fact, that which prevails in England may not prevail here.

In the recent case of *Walsh v. Willaughan* (1918), 42 O.L.R. 455, 42 D.L.R. 581, the purchaser expressly contracted himself out of "reclamation" "or compensation for moneys paid."

In the case of *Brickles v. Snell*, [1916] 2 A.C. 599, 30 D.L.R. 31, the Judicial Committee of the Privy Council seemed to take it for granted that the defaulting purchaser would have been entitled to recover the "deposit" if he had sued for it. It may be that this case and that of *Howe v. Smith* may be reconciled in this way: it may be that if tried by a jury in England the verdict in the latter might have accorded with the judgment given in it. Whilst it is pretty sure that in the former the verdict in Canada should have accorded with the views of the Judicial Committee.

In the case of *Steedman v. Drinkle*, [1916] 1 A.C. 275, 25 D.L.R. 420, although there was an expressed contract for retention by the seller, as liquidated damages, of moneys paid, the purchaser was held to be entitled to recover the "down payment" made by him, the case being treated as one for relief from forfeiture.

So that the Privy Council at all events has gone pretty near to the rule that if the seller be fully compensated that is enough: a very reasonable rule, at all events under ordinary circumstances: and, in any case, it should not be left to any Judge's notions of what is fair, whether relief from forfeiture should be granted, or forfeiture imposed under the guise of an implied contract or without any contract.

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Two payments were made in this case: one was expressed to be "deposited," but that word could have no technical meaning in the minds of these unlettered men; the other was to be and was paid "before loading:" facts which point more towards making sure of payment for the goods if delivered than to a forfeiture for breach of contract; but that which is conclusive is that neither party intended a forfeiture; that is put beyond question in the testimony of each.

I would allow this appeal with costs, and direct that judgment be entered in favour of the plaintiff in the action, and \$75 damages, with costs as provided for by the Rules.

Appeal allowed.

[APPELLATE DIVISION.]

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HESS v. GREENWAY.

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June 23

Landlord and Tenant—Lease of Part of Building—Injury to Goods of Sublessee by Bursting of Steam-pipe—Heating of whole Building Undertaken by Tenant of another Part—Duty of Landlord—Reasonable Care—Negligence—Sic Utere tuo ut Alienum non Ledas—Covenant of Tenant to Repair—Warranty of Fitness—Duty of Tenant Operating Heating Plant.

Part of a building was let by the defendant E. to the defendant G., and another part to the defendant company. The plaintiff was subtenant of G. of part of the part of which G. was tenant. By the terms of the lease to G., E. agreed to heat the "premises during all lawful working days to a reasonable extent, but will not be responsible for damages . . . if the parties under contract with the lessor to heat said building fail to do so, until he shall have reasonable notice . . ." By the terms of the lease to the company, it was to heat the building. The plaintiff's sublease contained a provision that heat would be furnished as specified in the lease to G. All the parties knew of the terms of the lease to the company, and that the heating of the building and the heating appliances were to be under the control and management of the company, subject to the right of E. to take over the heating in certain events. The action was brought to recover damages for the loss sustained by the plaintiff owing to the bursting of a steam-pipe, part of the heating apparatus of the building, in the room occupied by him:—

Held, that, if the defendant E. owed any duty to the plaintiff, it was not an absolute duty, but merely a duty, in the operation of the heating system, to take reasonable care to see that the heating appliances were in and were kept in such a state of repair that injury would not result to the occupants of the part of the building leased to G. from the operation of the heating system—in other words, not to be negligent in the performance of that duty.

Hart v. Rogers, [1916] 1 K.B. 646, distinguished.

Dunster v. Hollis, [1918] 2 K.B. 795, approved.

The heating plant was being operated for the benefit of the plaintiff and G. as well as that of the landlord; and the maxim *sic utere tuo ut alienum non ledas* did not apply.

The principle of the decision in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, was not applicable.

Review of the authorities.

The doctrine established by *Rylands v. Fletcher* is subject to several qualifications, one of which is that, "where a man uses his land in the ordinary and reasonable manner of use, and damage happens to his neighbour without wilfulness or negligence, no action lies:" *Gill v. Edouin* (1894-5), 71 L.T.R. 762, 763, 72 L.T.R. 579.

By the lease from E. to G., the latter covenanted with E. "to repair, reasonable wear and tear, lightning and tempest only excepted:"—

Held, that, although the plaintiff, being only a sublessee of part of the premises, did not incur any liability to E. on the covenant, he took subject to the obligation of G., and had no right to look to E. to repair any part of the demised premises. The plaintiff and G. took the premises as they were; and, in such circumstances, a tenant is not entitled to claim from his landlord damages for loss sustained owing to the defective condition of the premises when let, or to any want of repair arising during the term. If the heating appliances in the premises demised to G. were out of repair or became so during the term, no liability to repair attached to the landlord.

Held, also, that no negligence on the part of E. was proved.

Held, also, that a landlord does not, in the letting of such a building as E. let, warrant that the building is reasonably fit for the purpose for which it is intended that it shall be used: the tenant takes it as it is, and the landlord is under no obligation to repair or to make good anything that is found to be defective or out of repair.

Barker v. Ferguson (1908), 16 O.L.R. 252, approved.

The action was dismissed as against all the defendants: no case was made against G.; and the case against the company failed for the reasons given in dealing with the case against E., and for the additional reason that the company owed no duty to the plaintiff except the duty, in operating the heating plant, to do him no intentional injury.

Judgment of LATCHFORD, J., affirmed.

AN action for damages for the loss sustained by the plaintiff owing to the bursting of a steam-pipe in a room occupied by him in a building owned by the defendant Elliott.

September 22, 1918. The action was tried by LATCHFORD, J., without a jury, at a Toronto sittings.

T. N. Phelan, for the plaintiff.

G. H. Gilday, for the defendant Greenway.

William Proudfoot, K.C., for the defendant Elliott.

H. J. Scott, K.C., for the defendant the Sinclair & Valentine Company.

November 2, 1918. LATCHFORD, J.:—For some time prior to December, 1917, the plaintiff carried on the business of typesetting in part of a building, extending from Nelson street to Richmond street west, in the city of Toronto, owned by the defendant Elliott. On Nelson street the building was numbered 74 and 76, and on Richmond street 229, 231, and 233. Hess

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occupied part of the Richmond street front, under a lease from the owner. In July of 1917 the defendant Greenway, who carried on business as "The Greenway Press," arranged with Hess and Elliott that Hess would surrender the lease which he held, that Elliott would demise to Greenway the ground-floor of No. 74 Nelson street for three years from the 1st September, 1917, and that Hess would sublet from Greenway for the same term a part of such floor fifteen feet in width on Nelson street "and five windows back from front of building"—a distance of between thirty-five and forty feet—"heat to be provided as specified in the Greenway Press lease with the owner David Elliott."

Elliott and Greenway, on the 1st September, 1917, executed a lease pursuant to the Short Forms of Leases Act. It contained a clause under which Elliott agreed to heat the demised premises "during all lawful working days to a reasonable extent." The lessor was not to be responsible for damages "during necessary repairs to the heating plant, nor if the parties under contract with the lessor to heat said building fail to do so, until he shall have received reasonable notice from time to time of the conditions, and shall have taken over the heating of the said building himself, and shall have had a reasonable opportunity of remedying such conditions."

The "parties" who were so under contract to heat the building are the Sinclair & Valentine Company, defendant, to whom, on the 1st September, 1917, Elliott demised for three years No. 233 Richmond street west, running through to, and including, Nos. 76 and 78 Nelson street; "also the basement and boiler rooms under Nos. 229 and 231 Richmond street west, in the said building."

The lease contains an agreement by the Sinclair & Valentine Company to furnish fuel and a competent man so as to provide heat in the several sections of the building "to the reasonable satisfaction of the tenants therein."

The lessor agreed to change the boilers from low to high pressure, and to put on a reducing valve "to step the steam pressure down to the necessary pressure to heat the building."

The plaintiff entered into possession under his agreement with Greenway, and proceeded to cut off the portion he had

leased, by partitions extending from floor to ceiling. Greenway urged Hess to use woven wire instead of glass in the partitions above a height of six or seven feet, so as to permit an equalisation of the temperature between the plaintiff's premises, exposed as they were, owing to the many windows on the east, to extremes of heat and cold, and that portion of the ground-floor occupied by Greenway. Hess, however, used glass.

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The only means of heating the linotype room and office of the plaintiff consisted of one end of a radiator or set of ten or twelve one-inch steam pipes, seventy-two feet in length between the headers, suspended from hangers along the east wall of the building under the windows. The length of the end of the radiator projecting into the plaintiff's premises was about thirty-five feet. From the south end of the lowest pipe a half-inch pipe led to a valve in the distant basement near the boiler. This small pipe was a necessary part of the system at one time, but not after high pressure boilers had been installed by Elliott, as he had agreed in his lease to the Sinclair & Valentine Company. It was, however, allowed to remain in its old position. It was not intended to be used to drain the radiators; but at times, when steam was turned into the heating system after being off, as it sometimes was from Saturday afternoon until Sunday or Monday morning, the opening of the valve at the end near the boilers induced a more rapid circulation of steam than would otherwise have been possible. To allow the valve to remain open more than a few minutes would have occasioned a loss of steam, and consequent lessening of the effect which the steam was generated to produce.

On the 28th December, 1917, during a period of extreme cold, water accumulated in this small pipe, as a result no doubt of condensation, and there froze, bursting the pipe and causing leaks. Hess called in a foreman of the defendant Greenway, who promised that something would be done "as soon," to use Hess's words, "as the cold spell was over." Before that period was over—next day in fact—Saturday the 29th December, about half-past ten in the morning, the engineer of the Sinclair & Valentine Company, who was in control of the heating plant, after communicating with Mr. Elliott, cut off the small pipe

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where it had burst, and placed a plug in the end connected with the radiator. The return-pipe from the radiator was not interfered with. Steam was shut off while the work was being done—a period of less than half an hour.

The weather was intensely cold that day. At the observatory a minimum of 17 degrees below zero was recorded.

Hess closed his shop about noon. He returned about 4 p.m., and then noticed that the temperature in it was unusually low. He did not, however, report the fact to Greenway or to either of the other defendants, or to the engineer of the Sinclair & Valentine Company, or open a door which led from the linotype room to the Greenway premises. Steam had been cut off for an hour or more in the interval between noon and 4 o'clock, but was on again from 4 or 4.15 until 5.15, when it was cut off, as was usual on Saturday afternoon. The steam remained off until Sunday morning. It continued on until Sunday night, when it was again turned off until Monday morning.

The weather in the interval, while it had moderated a few degrees, continued to be excessively cold—11 degrees being the recorded minimum.

In consequence of a message from Greenway's foreman, Hess came down early on Monday to find his type-setting machines badly rusted and damaged owing to a series of bursts in the steam-pipes. On Saturday night, or Sunday night, water had accumulated by condensation in the lower tubes of the radiator, along a sag, greatest about midway between the headers. The water froze while the steam was off, and expanding burst the pipes, causing water and steam to escape into the plaintiff's premises when steam was turned on, and occasioning serious damage to the plaintiff's delicate and costly machines. For such damage and the loss consequent upon it, the plaintiff seeks to hold the defendants, or one of them, liable.

As against Greenway it is contended that his agreement—"heat to be provided as specified in the Greenway Press lease with Elliott"—amounts to an undertaking on his part that heat as so specified shall be provided.

It may also be regarded, it is said, as an assignment of the agreement—a covenant it is not, as the lease is not under seal—

as to heating expressed in Elliott's lease to Greenway—and that, viewed in that aspect, Elliott, as well as Greenway, is liable. Liability of Elliott in tort is also put forward, on the ground that the pipes which Elliott had placed in position were so faultily arranged, or hung, that they sagged and thus caused damage to the plaintiff. Another ground of his claim against Elliott is that Elliott ordered or sanctioned the cutting and plugging of the small pipe, on the 29th, by the engineer of the Sinclair & Valentine Company. The company is to be held liable because its engineer cut the small pipe, and, by shutting off the steam on Saturday, and overnight on Saturday and Sunday, occasioned the damage sustained by the plaintiff.

I find, upon the evidence, that the work done on the small pipe on Saturday had nothing to do with the accident. Ordinarily that pipe was closed as effectively by the valve near the boiler as it was by the plug put in by the Sinclair & Valentine Company's engineer. Nor did the bursts result from the shutting off of the steam on Saturday morning while the work was being done. Elliott's sanction—properly sought and properly given, as he was the owner of the building—is therefore immaterial. A circumstance tending to shew the want of relation between the cutting and plugging of the small pipe is that no change was afterwards made in that pipe, and that no trouble arose when later in the same winter the mercury fell to 20 degrees below zero. The only change in the plaintiff's premises during the winter was that a door from the linotype room to the Greenway premises was left open whenever the weather was very cold. A much greater equalisation of temperature would, in my opinion, have been effected had Greenway's recommendation as to the use of wire instead of glass in the upper part of the partitions been adopted by the plaintiff.

Upon the most favourable construction to the plaintiff of the agreement as to heating between Greenway and Hess, the latter was entitled to nothing more than what Elliott had bound himself to furnish Greenway. By the reference to the Elliott-Greenway lease, all the conditions affecting Elliott's liability to Greenway for damages equally affected Greenway's liability to Hess for damages. The premises were to be heated only during

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working days, and Greenway was not to be responsible for damage arising during necessary repairs, nor if the "parties" (Sinclair & Valentine Company) under contract with Greenway to heat the building failed to do so, until Greenway had received reasonable notice of the conditions, had taken over the heating of the building himself, and had been afforded a reasonable opportunity of remedying the conditions.

The interval between Saturday and Monday, in which the accident occurred, was not a lawful working day. Even if it was, and the Sinclair & Valentine Company failed to heat the premises, Greenway was entitled to notice of their failure, and to an opportunity of remedying it. He had no such notice and no such opportunity. The leak in the small pipe, of which he had notice, caused no damage and had no connection with the damage sustained.

I am, therefore, of opinion that no liability can be held to attach to Greenway.

The action of the engineer of the Sinclair & Valentine Company in cutting and plugging the small pipe having no relation to the accident, the action as against that company also fails.

It is urged that Elliott is liable owing to the defective construction of the heating system, or the negligent inspection and maintenance thereof.

A defect undoubtedly existed in the radiator at the time of the accident—a sag of about an inch—and but for the sag it is improbable that the accident would have happened. Other causes undoubtedly contributed, as the shutting off of the steam during part at least of what was not a working day, the isolation of the plaintiff's premises from other portions of the same floor in which the other half of the same pipes did not burst, and then the intensely cold weather.

But, even if the sag in the radiator was the sole and direct cause of the accident, no liability attaches to Elliott. No contractual relation whatever existed between him and the plaintiff. He had not, either in his lease to Greenway, or in his lease to the Sinclair & Valentine Company, covenanted to repair. There was, in the circumstances, no breach of any duty which Elliott owed to his tenants, or, for a greater reason, to the plaintiff: Hals-

bury's Laws of England, vol. 18, p. 504; *Lane v. Cox*, [1897] 1 Q.B. 415.

The action wholly fails and is dismissed with costs.

If the plaintiff was entitled to succeed, I should have estimated his damages at \$700.

The plaintiff appealed from the judgment of LATCHFORD, J.

February 11 and 12, 1919. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

T. N. Phelan, for the appellant. The action is for breach of duty by the defendants, and lies in tort, rather than in contract. [MAGEE, J.A., referred to *Gregson v. Henderson Roller Bearing Co.* (1910), 20 O.L.R. 584.] That case has no application to this, which turns on breach of duty by the landlord, Elliott, who had control of the building, and by the defendant the Sinclair & Valentine Company, which was under contract to heat the building. The learned trial Judge has dealt with the case as a matter of contract, as in a case cited by him, *Lane v. Cox*, [1897] 1 Q.B. 415. The appellant was more than a licensee, and the landlord, who had control of the heating plant, was bound to install and operate it with care. The Sinclair & Valentine Company was also liable, because it assumed to use the heating plant, and should have seen that the pipes, which were installed ten years earlier, were fit for the purpose. There was a duty not only to install the plant, but to maintain it in good order. [HODGINS, J.A., referred to *Dubé v. Algoma Steel Corporation Limited* (1916), 35 O.L.R. 371, 27 D.L.R. 65; *S.C.*, *sub nom. Algoma Steel Corporation Limited v. Dubé* (1916), 53 Can. S.C.R. 481, 31 D.L.R. 178.] I do not press the point as to the work done on the "drip-pipe," as there is a finding against me on that point by the trial Judge. The case at bar is not within the *Lane* case, or the *Gregson* case, *supra.* [MAGEE, J.A., referred to *Cavalier v. Pope*, [1906] A. C. 428.] *McNichol v. Malcolm* (1907), 39 Can. S.C.R. 265, cited at the trial, is in point. I also refer to *Durant v. Ontario and Minnesota Power Co.* (1917), 41 O.L.R. 130; *Till v. Town of Oakville* (1915), 33 O.L.R. 120,

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21 D.L.R. 113; *Müller v. Hancock*, [1893] 2 Q.B. 177; *Hart v. Rogers*, [1916] 1 K.B. 646, where the landlord was held to be practically an insurer. [Scott, K.C., said that the *Hart* case was dissented from in *Melles & Co. v. Holme*, [1918] 2 K.B. 100.] I also refer to *Great Western R. W. Co. of Canada v. Braid* (1863), 1 Moo. P.C. N.S. 101. [MAGEE, J.A., remarked that that was a passenger case, but the principle was the same.] If the other defendants are not liable to the plaintiff, the defendant Greenway is liable under his contract. [MEREDITH, C.J.O., referred to *Murphy v. Phillips* (1876), 35 L.T.R. 447, and *McKinlay v. Mutual Life Assurance Co.* (1918), 43 D.L.R. 259, and asked if the measure of the duty owed by the defendants was not merely to take reasonable care.] One duty in which they failed was to inspect and examine the plant from time to time, and see that it was in proper working order. Contributory negligence cannot be alleged against the plaintiff, who did nothing which had any causal connection with the accident.

H. J. Scott, K.C., for the defendant the Sinclair & Valentine Company, respondent, referred to the lease from Elliott to the company, under which it had continuously performed the duties incumbent upon it. The company employed a competent man and provided the fuel, but was not responsible for the condition of the plant, which met with an unexpected accident. If it had any defect, it was in its construction, with which the company had nothing to do, and not in its operation by the company. *Earl v. Lubbock*, [1905] 1 K.B. 253, was referred to as the nearest case to the present, and not distinguishable from it. He also referred to *Malone v. Laskey*, [1907] 2 K.B. 141, and the cases there cited, and to the *Melles* case, *supra*.

William Proudfoot, K.C., for the defendant Elliott, respondent, argued that the action was to a large extent founded on a contractual relation. The plaintiff was quite conversant with the system of heating used and with the lease to the Sinclair & Valentine Company. There was no apparent defect, and the plumber saw nothing wrong. The alignment of the bricks would not shew the alleged defect. The appellant was chargeable with contributory negligence in not using woven wire instead of a solid partition. The accident was an unavoidable one, owing to

the peculiar weather conditions then prevailing. The respondent Elliott exercised reasonable care in the circumstances, and no inspection was called for, as the pipes were apparently all right. The plaintiff made the work done on the small pipe the main point of his case at the trial, but had subsequently to abandon the point. The respondent Elliott owed no duty to the appellant which he failed to discharge. Counsel referred to the *Cavalier* case, *supra*; *Winterbottom v. Wright* (1842), 10 M. & W. 109; *Underhill on Torts*, 3rd (Canadian) ed., p. 172; *Rogers v. Sorell* (1903), 14 Man. R. 450, following *Humphrey v. Wait* (1873), 22 U.C. C.P. 580, and *Carstairs v. Taylor* (1871), L.R. 6 Ex. 217; *Robbins v. Jones* (1863), 15 C.B. N.S. 221. The *Lane* case, *supra*, bears out the landlord's contention here.

G. H. Gilday, for the defendant Greenway, respondent, was not called upon by the Court.

Phelan, in reply, argued that a man could not contract himself out of such a liability as was in question here. The principle of the maxim *sic utere tuo* is applicable. The *onus* is on the respondents to explain the break-down of the plant which was under their control, and this they have failed to do. We are within the principle of *Heaven v. Pender* (1883), 11 Q.B.D. 503, and *Indermaur v. Dames* (1866), L.R. 1 C.P. 274. The *Melles* case is founded on contractual rights, and does not assist in this case, which is based on tort. Reference was made to *Blyth v. Birmingham Waterworks Co.* (1856), 11 Ex. 781, 784, and to *Derry v. Peek* (1889), 14 App. Cas. 337.

June 23. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 2nd November 1918, which was directed to be entered by Latchford, J., after the trial before him, sitting without a jury, at Toronto, on the 22nd September in that year.

The action is brought to recover damages for the loss sustained by the appellant owing to the bursting of a steam-pipe in a room occupied by him in a building owned by the respondent Elliott. Parts of the building were let by the respondent Elliott: one part to the respondent Greenway and another part to the respondent the Sinclair & Valentine Company, and the appellant

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was subtenant of the respondent Greenway of part of that part of the building of which he was tenant.

The building was steam-heated, and the boiler by which the steam was produced was in the basement, and was included in the lease to the Sinclair & Valentine Company.

The steam was carried through the building by means of iron pipes attached to the outer walls of it; the piping in the premises let to the respondent Greenway consisted of ten pipes hung horizontally for the distance of seventy-one feet, part of which was in the part sublet to the appellant, and the remainder in the other part of the premises let to the respondent the Sinclair & Valentine Company, by whom it was occupied.

By the terms of the lease to the respondent Greenway, the respondent Elliott agreed to "heat said premises during all lawful working days to a reasonable extent, but will not be responsible for damages in case fuel is unobtainable, nor during necessary repairs to heating plant, nor if the parties under contract with the lessor to heat said building fail to do so, until he shall have received reasonable notice from time to time of the conditions, and shall have taken over the heating of said building himself, and shall also have had a reasonable opportunity of remedying such conditions."

The lease to the respondent the Sinclair & Valentine Company contains the following provisions as to the heating system and its operation:—

"It is understood and agreed by and between the parties hereto that the lessee will furnish sufficient fuel provided same can be obtained and a competent man to look after the heating apparatus so as to provide heat in the entire six sections or block, to the reasonable satisfaction of the tenants therein.

"Provided always that if the lessor receives complaints from the other tenants in said block or is called upon to pay any claim for or in connection with insufficient heating therein, he may himself at any time or from time to time undertake the furnishing of fuel, the employment of a competent man as aforesaid, or any other thing in connection with said heating, and charge the lessee with all expenses for the same or in reference thereto, such expenses to be payable forthwith upon demand and to be

and be treated and collectable as rent in arrear hereunder, and in any such case the lessee shall not in any way interfere with the lessor or any person or persons employed by him in connection with the heating aforesaid.

“The said lessor agrees to change boilers in said building to high pressure and have same tested to fifty lbs. pressure by Casualty Company. Put on reducing valve to step the steam pressure down to the necessary pressure to heat the said building. Also install two traps to return the water to boiler. The entire work to be completed on or before August 31st, 1917.”

The lease to the appellant contains a provision that heat will be provided, “as specified in the Greenway Press lease with the owner David Elliott.”

It is clear from the provisions of these leases that all the parties knew of the terms of the lease to the respondent the Sinclair & Valentine Company as to the heating of the building, and that the heating of the building and the heating appliances were to be under the control and management of that company, subject to the right, reserved by the lease to that company, of the respondent Elliott himself to take over the heating of the building in certain events, upon the happening of which it was provided that he should have the right to do so.

The questions to be determined are:—

(1) Whether there was any duty resting upon the respondent Elliott, in the operation of the heating system, to take care that the piping in the part of the building occupied by the appellant was in a proper state of repair and condition.

(2) Whether that duty, if it existed, was an absolute one or only a duty to take reasonable care.

(3) Whether, if the duty was only to take reasonable care, the respondent Elliott failed to discharge that duty.

No question arises as to the right of the respondent Elliott to delegate any duty resting upon him as to the heating of the premises, because it is clear, as I have said, that the appellant knew of the arrangement as to the heating system and the heating of the building that had been entered into with the Sinclair & Valentine Company, and must be taken to have assented to the delegation of the duty.

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I am unable to agree with the contention of Mr. Phelan that the duty which, as he contended, the respondent Elliott owed to the tenants of the building, was an absolute duty, and I am of opinion that, if he owed any duty to the appellant, it was a duty, in the operation of the heating system, to take reasonable care to see that the heating appliances were and were kept in such a state of repair as that injury would not result to the occupants of the part of the building leased to the respondent Greenway from the operation of the heating system—in other words, not to be negligent in the performance of that duty.

Negligence has been defined to be “the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do:” *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, 784; and negligence is not “absolute or intrinsic,” but “is always relative to some circumstance of time, place, or person,” imposing a duty to take care: *Degg v. Midland R. W. Co.* (1857), 1 H. & N. 773, 781.

Before dealing with the question of negligence as applied to the circumstances of the case at bar, I will state shortly the reasons why I do not think that the duty of the respondent Elliott—which for the present I will assume he owed to the appellant—was an absolute one, but only a duty not to be guilty of negligence.

Counsel for the appellant relied upon the judgment of Scrutton, J., in *Hart v. Rogers*, [1916] 1 K.B. 646, but I prefer the reasoning and decision of Lush, J., in *Dunster v. Hollis*, [1918] 2 K.B. 795, and it is to be observed that the question in *Hart v. Rogers* was an entirely different one from that presented for consideration in the case at bar. In that case the landlords let to a tenant a flat on the top-floor of a building, but retained possession and entire control of the roof. Water found its way into the flat through cracks in the roof, and what was held was that the landlords were bound to repair the roof, and that they did not discharge that obligation by shewing that they took reasonable care to keep it in repair.

In the case at bar, the heating plant, to the knowledge and

with the assent of the appellant, was not being managed by the landlord, but by the respondent the Sinclair & Valentine Company, and it was the means by which heat was to be supplied to the premises occupied by the appellant and the respondent Greenway, and the plant was therefore being operated for their benefit as well as that of the landlord. Nor is it a case to which the maxim *sic utere tuo* applies.

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If the principle of the decision of the House of Lords in *Rylands v. Fletcher* (1868), L. R. 3 H.L. 330, is applicable to the case at bar, it may be that we are bound to hold that the duty of the respondent Elliott was an absolute one, and that he is answerable for the consequences of the bursting of the pipes.

In some of the Courts of the neighbouring States, the view is taken that the principle is so broadly stated that it is applicable where a man has brought on his land for the purpose of his business something necessary for carrying it on, which is neither in itself nor in its operation a nuisance, but which without negligence causes injury to another; but these Courts have declined to apply the principle to such cases.

The reasoning of Beasley, C.J., in *Marshall v. Welwood* (1876), 38 N.J. Law 339, against its applicability and combatting "the broad doctrine . . . that a man in law is an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others" (p. 343), commends itself to me as sound, and it is difficult to see how, if it were otherwise, the business of a modern town or city could be carried on.

A similar view was taken by the Commission of Appeals of the State of New York in *Losee v. Buchanan* (1873), 51 N.Y. 476.

In these two cases, the question was as to the liability of a person on whose premises a steam-boiler was operated to answer in damages to his neighbour for injuries caused by the explosion of the boiler, and the holding was that if it was operated with care and skill so that it was no nuisance, in the absence of proof of negligence on his part, he was not liable.

In *Cosulich v. Standard Oil Co.* (1890), 122 N.Y. 118, it was held by the Court of Appeals that "the law does not impose upon

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one conducting a lawful business upon his own lands the obligation of saving others harmless from the consequences of inevitable accidents; the limit of his duty where no contract relations exist, is the exercise of reasonable care and caution to save others from injury."

Jaffe v. Harteau (1874), 11 Sickels (N.Y.) 398, is a case somewhat similar to the case at bar. The defendant was the owner of a house leased to one Van Duzer. Van Duzer sublet a part of it to the husband of the plaintiff. She was injured by the explosion of a kitchen-boiler, used by the tenants, which was situate in the top of the house. The action, which was brought to recover damages for injuries sustained by the plaintiff owing to the explosion, failed, the Court being of opinion that the defendant was not liable, there being no evidence that he knew of or had any reason to suspect any defect or that any danger was to be apprehended from the use of the boiler for the purpose intended.

In *Peil v. Reinhart* (1891), 127 N.Y. 381, the plaintiff sued to recover damages for injuries sustained owing to her having tripped on a stairway carpet which, to the knowledge of the defendant, was in a defective condition, used by the defendant's tenants, of whom the plaintiff was one; and in delivering the judgment of the Court, Bradley, J., stated the duty of the defendant to be "to use reasonable care to keep this stairway in repair and suitable condition for the safe passage by his tenants over it in their way to and from their rooms."

It is satisfactory to know that the English Courts have not pressed the doctrine of *Rylands v. Fletcher* as far as in the view of these American Courts it logically extends, and that at all events it is not to be applied to such a case as this, where the thing which causes the injury is not operated solely for the benefit of the owner of it, but for the benefit of the person who suffers the injury as well as of the owner.

Such a case was *Carstairs v. Taylor*, L.R. 6 Ex. 217. In that case the facts were that the plaintiffs hired of the defendant the ground-floor of a warehouse, the upper part of which was occupied by the defendant himself. The water from the roof was collected by gutters into a box, from which it was discharged by

a pipe into the drains. A hole was made in the box by a rat, and through this hole the water entered the warehouse and wetted the plaintiffs' goods. The defendant had used reasonable care in examining and seeing to the security of the gutters and the box. The doctrine of *Rylands v. Fletcher* was invoked by the plaintiffs, but the action failed, the Court holding that the defendant was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse. Bramwell, B., stating his opinion (pp. 221, 222), said:—

“In *Rylands v. Fletcher* the defendant, for his own purposes, conducted the water to the place from which it got into the plaintiff's premises. Here the conducting of the water was no more for the benefit of the defendant than of the plaintiffs. If they had been adjacent owners, it would have been for the benefit of the adjacent owner that the water from *his* roof was collected, and the case would have been within the decision in *Rylands v. Fletcher*; but here the roof was the common protection of both, and the collection of the water running from it was also for their joint benefit.”

In *Ross v. Fedden* (1872), L.R. 7 Q.B. 661, the facts were that the plaintiff occupied for business purposes the ground-floor and the defendants the second-floor of the same house, respectively, as tenant from year to year. There was a water-closet on the defendants' premises to and of which they alone had access and use. After their respective premises had been closed on a Saturday evening, water percolated from the water-closet through the first-floor to the plaintiff's premises and caused damage to his stock in trade. The overflow was owing to the valve of the supply-pipe to the pan having got out of order and failed to close and the waste-pipe being choked with paper. The defects could not be detected without examination, and the defendants did not know of them, and were guilty of no negligence. The action, which was brought to recover damages for the injury done to the plaintiff's stock-in-trade, failed, the Court being of opinion that there was no obligation on the defendants to keep the water in at their peril, and they, having been guilty of no negligence, were not liable to the plaintiff for the damage

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he had sustained. *Rylands v. Fletcher*, which was relied on by the plaintiff's counsel, was distinguished, and the proposition of counsel, "that, the plaintiff and defendants being occupiers under the same landlord, the defendants, being the occupiers of the upper storey, contracted an obligation binding them in favour of the plaintiff, the occupier of the lower storey, to keep the water in at their peril," was negatived. It was also held that the maxim *sic utere tuo ut alienum non lœdas* did not apply.

The distinction between cases of occupiers of adjacent lands and cases of occupants of separate storeys in the same house, established by these two cases, was recognised in *Humphries v. Cousins* (1877), 2 C.P.D. 239, 246, and the principle of the decision in *Carstairs v. Taylor* was applied by the Court of Appeal in *Anderson v. Oppenheimer* (1880), 5 Q.B.D. 602, in which case it was held that, as the water which escaped was stored in a cistern for the benefit of the plaintiffs as well as of the other tenants, the doctrine laid down in *Rylands v. Fletcher* did not apply. The same principle was applied in *Blake v. Woolf*, [1898] 2 Q.B. 426. I refer also to *Gill v. Edouin* (1894-5), 71 L.T.R. 762, 72 L.T.R. 579. It was also recognised by a Divisional Court in *Powley v. Mickleborough* (1910), 21 O.L.R. 556; see also *Childs v. Lissaman* (1904), 23 N.Z. L.R. 945, where the cases are collected and dealt with, which was referred to with approval in *Powley v. Mickleborough*.

It is also to be observed that, as Wright, J., pointed out in *Gill v. Edouin*, 71 L.T.R. at p. 763, the doctrine established by *Rylands v. Fletcher* is subject to several qualifications, one of which is that, "where a man uses his land in the ordinary and reasonable manner of use, and damage happens to his neighbour without wilfulness or negligence, no action lies."

I have thus far dealt with the case apart from the fact that the piping, which, according to the contention of the appellant, was defective and out of repair, was situate in that part of the building leased to the respondent Greenway and sublet to the appellant.

By the lease from the respondent Elliott to the respondent Greenway, the latter covenanted with Elliott "to repair, reasonable wear and tear, lightning and tempest. only excepted;" and.

although the appellant, being only a sublessee of part of the premises, did not incur any liability to Elliott on the covenant, he took subject to the obligation on the part of his immediate landlord and had no right to look to Elliott to repair any part of the demised premises. He and his immediate landlord took the premises as they were, and it is well-settled law that in such circumstances the tenant is not entitled to claim from his landlord damages for loss sustained owing to the defective condition of the premises when they were let, or to any want of repair arising during the term.

It is clear, therefore, that if the heating appliances in the premises demised to Greenway were in bad condition or out of repair or became so during the term, no liability attached to the landlord to put them in proper condition or to repair them.

Then as to negligence. Mr. Phelan's argument failed to satisfy me that any negligence on the part of Elliott was proved. The proximate cause of the bursting of the pipes was the freezing, after the heating plant had been shut down, of water formed by the condensation of the steam which had lodged in a slight sag or depression in the pipes. It is clear that this sag or depression had existed from the time when the pipes had been first attached to the wall of the building, which was eleven years before the trial. The heating system had been operated during all those years without anything untoward happening, and nothing had occurred that shewed that any trouble or danger was to be apprehended from the existence of the sag; and it is, I think, impossible, on that state of facts, to find that the respondent Elliott was negligent because he did not take steps to have the sag taken out. Neither the respondent Greenway nor the appellant appears to have anticipated danger from the existence of the sag; and I do not see why, if they did not anticipate it, negligence should be attributed to Elliott because he did not.

It is also clear law that a landlord does not, in the letting of a building such as Elliott let, warrant that the building is reasonably fit for the purpose for which it is intended that it will be used, but that the tenant takes it as it is, and his landlord is under no obligation to repair or to make good anything that is found to be defective or out of repair.

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On this branch of the case, *Barker v. Ferguson* (1908), 16 O.L.R. 252, *Rogers v. Sorell*, 14 Man. R. 450, and *Betcher v. Hagell* (1906), 38 N.S.R. 517, may be referred to.

In *Barker v. Ferguson* it was held that "a tenant taking part of a building, in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such defects as are apparent, otherwise he will have no remedy afterwards against the landlord for damage caused by such defects."

The case at bar is an *â fortiori* one for the application of the principle of this decision, because the defect existed in the demised premises.

I would, for these reasons, affirm the judgment dismissing the action as against the respondent Elliott, and dismiss the appeal from the judgment with costs. The same result must follow as to the other defendants. No case was made against the respondent Greenway, and the case against the respondent the Sinclair & Valentine Company also failed, for the reasons I have given in dealing with the case against the respondent Elliott, and for the additional reason that that company owed no duty to the appellant except the duty, in operating the heating plant, to do him no intentional injury.

Appeal dismissed.

APPENDIX.

Ontario cases decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada and reported since the publication of vol. 44 of the Ontario Law Reports:—

ELECTRICAL DEVELOPMENT CO. OF ONTARIO LIMITED v. ATTORNEY-GENERAL FOR ONTARIO AND HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO, 38 O.L.R. 383, reversed by the Judicial Committee of the Privy Council: ELECTRICAL DEVELOPMENT CO. OF ONTARIO v. ATTORNEY-GENERAL FOR ONTARIO AND HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO, [1919] A.C. 687.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO., 41 O.L.R. 108, affirmed by the Supreme Court of Canada: ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO., 58 Can. S.C.R. 169.

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gage Existing when Will Made
Paid off by Testator and New
Mortgage for Lesser Amount and
to a Different Person Substituted
—Will Speaking from Immediate-
ly before Death—“Contrary In-
tention”—Wills Act, sec. 27 (1)
—Division of Estate into Parts—
One Part to be “\$5,000 less than
the other three Parts”—Meaning
of.*

Re THOMPSON, 520.

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2. *Construction—Right of Occupancy by Wife and Daughters of Testator's House—Provision for Conveyance to Daughters at End of Occupancy—"Upon Payment" of Sum to Widow in Lieu of Dower—Condition—Charge upon Property—Interpretation by Court of Ambiguous Words—Costs.*

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"Actual Need:" REX V. RANKIN, 96.

"Alienation of Affections:" OSBORNE V. CLARK, 594.

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"Contractor:" READ V. WHITNEY, 377.

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"Insurance:" LEAVITT V. SPAIDAL, 611.

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"Loan:" HENDERSON V. STRANG, 215.

"Loss of Consortium:" OSBORNE V. CLARK, 594.

"Neglected Child:" *Re S.*, 46.

"Not to Cut down Timber:" MCPHERSON V. GILES, 441.

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"Personal Injury by Accident:" SCOTLAND *v.* CANADIAN CART- RIDGE CO., 586.

"Personal Property:" *Re* NEW YORK LIFE INSURANCE CO. AND FULLERTON, 244.

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"Profits Made or to be Made:" WADE *v.* JAMES, 157.

"Promissory Note:" SHEEHAN *v.* MERCANTILE TRUST CO. OF CANADA LIMITED, 422.

"Protestant:" *Re* S., 46.

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"Residence:" *Re* GIBSON AND CITY OF HAMILTON, 458.

"Return to Ontario:" SPARKS *v.* CONMEE, 202.

"Sale by Sample:" JOHN HAL- LAM LIMITED *v.* BAINTON, 483.

"Security:" *Re* NEW YORK LIFE INSURANCE CO. AND FUL- LERTON, 244.

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